SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 14

UNITED STATES OF AMERICA, APPELLANT,

vs.

FIVE GAMBLING DEVICES, LABELED IN PART, "MILLS," AND BEARING SERIAL NUMBERS 593,221; 578,827; 583,708; 578,831, AND 581,162

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

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1 [File endorsement omitted]

In United States District Court for the Middle District of Tennessee, Columbia Division

Civil No. 286

UNITED STATES OF AMERICA

vs.

FIVE GAMBLING DEVICES, LABELED IN PART, "MILLS," AND BEARING SERIAL NUMBERS 593221; 578827; 583708; 578831; AND 581162

LIBEL OF INFORMATION—Filed September 11, 1952

1. Jurisdiction is founded on the fact that the libelant is the United States of America.

2. In July and October, 1951, Edwin Haley Clement and William King Wallis, doing business as Automatic Music Company, were dealers in gambling devices, within the meaning of Title 15, Sections 1171, et seq., United States Code, who had failed to register with the Attorney General of the United States, as required by Title 15, Section 1173, United States Code, and sold to the Greymere Country Club, Columbia, Tennessee, five gambling devices, the description of which is set forth in the caption hereof, and is set forth below, without reporting the details of said sale to the Attorney General of the United States, as required by Title 15, Section 1173, United States Code.

3. On March 3, 1952, the following machines were seized by agents of the Federal Bureau of Investigation at the Grey-
2 mere Country Club, Columbia, Tennessee:

1. Mills, Serial No. 593221
2. Mills, Serial No. 578827
3. Mills, Serial No. 583708
4. Mills, Serial No. 578831
5. Mills, Serial No. 581162

4. The machines set forth above are now in possession of the United States Marshal and in storage at Bond-Chadwell Company, Nashville, Tennessee.

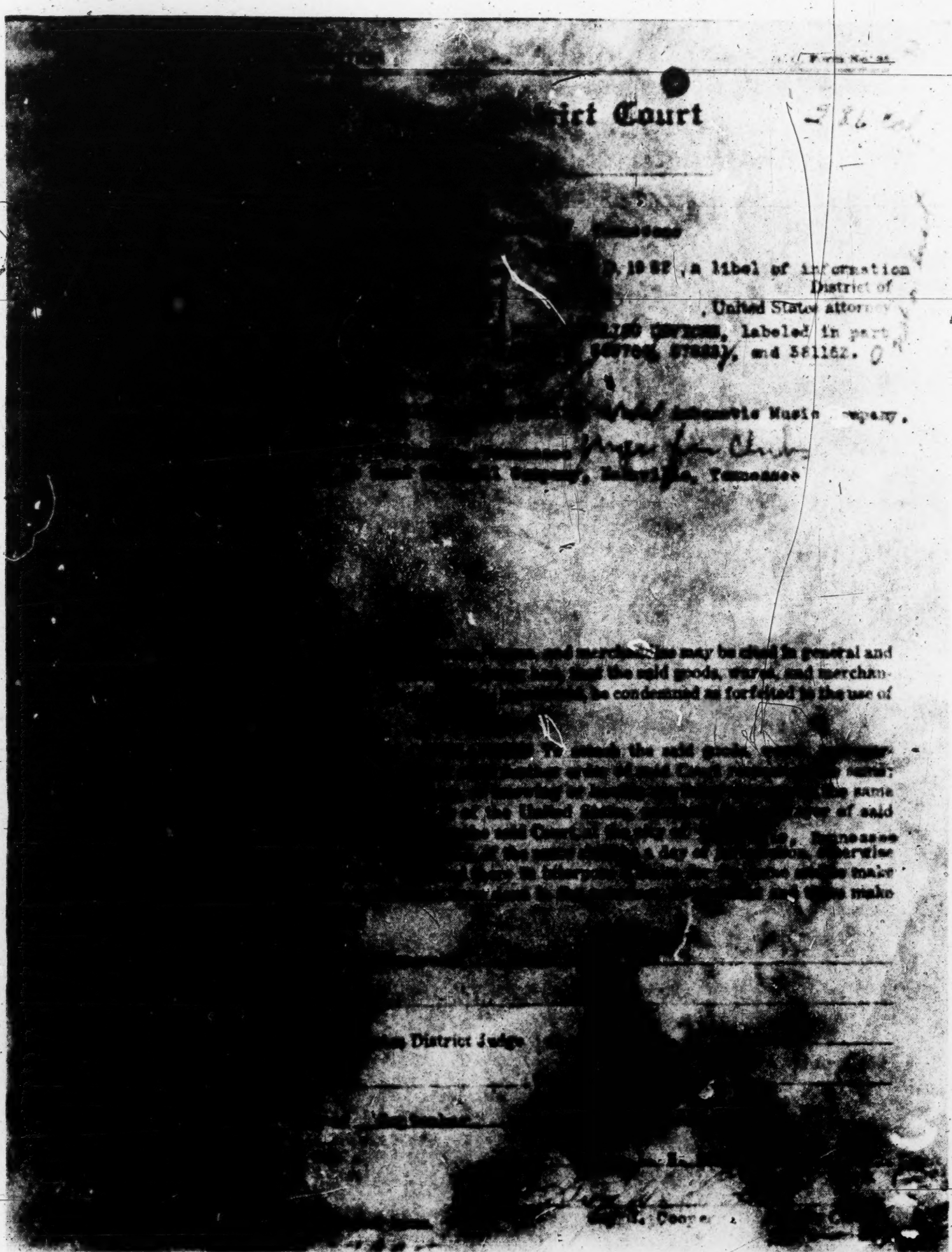
5. By reason thereof, and according to Title 15, Section 1177, United States Code, the said gambling devices became and are forfeited to the United States of America.

WHEREFORE, libelant prays that process and due form of law, according to the course of this Court in cases of admiralty jurisdiction, issue against the aforesaid devices to enforce the forfeiture;

that notice be given to all persons concerned in interest to appear and show cause at the return date of the process why the forfeiture should not be decreed; that the devices be disposed of as the Court may direct; and that libelant have such other and further relief as the case may require.

DICK L. JOHNSON,
United States Attorney.

(Here follow 2 photostats, folios 3 and 4.)



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Music Company,
Judges of Chancery
, Tennessee

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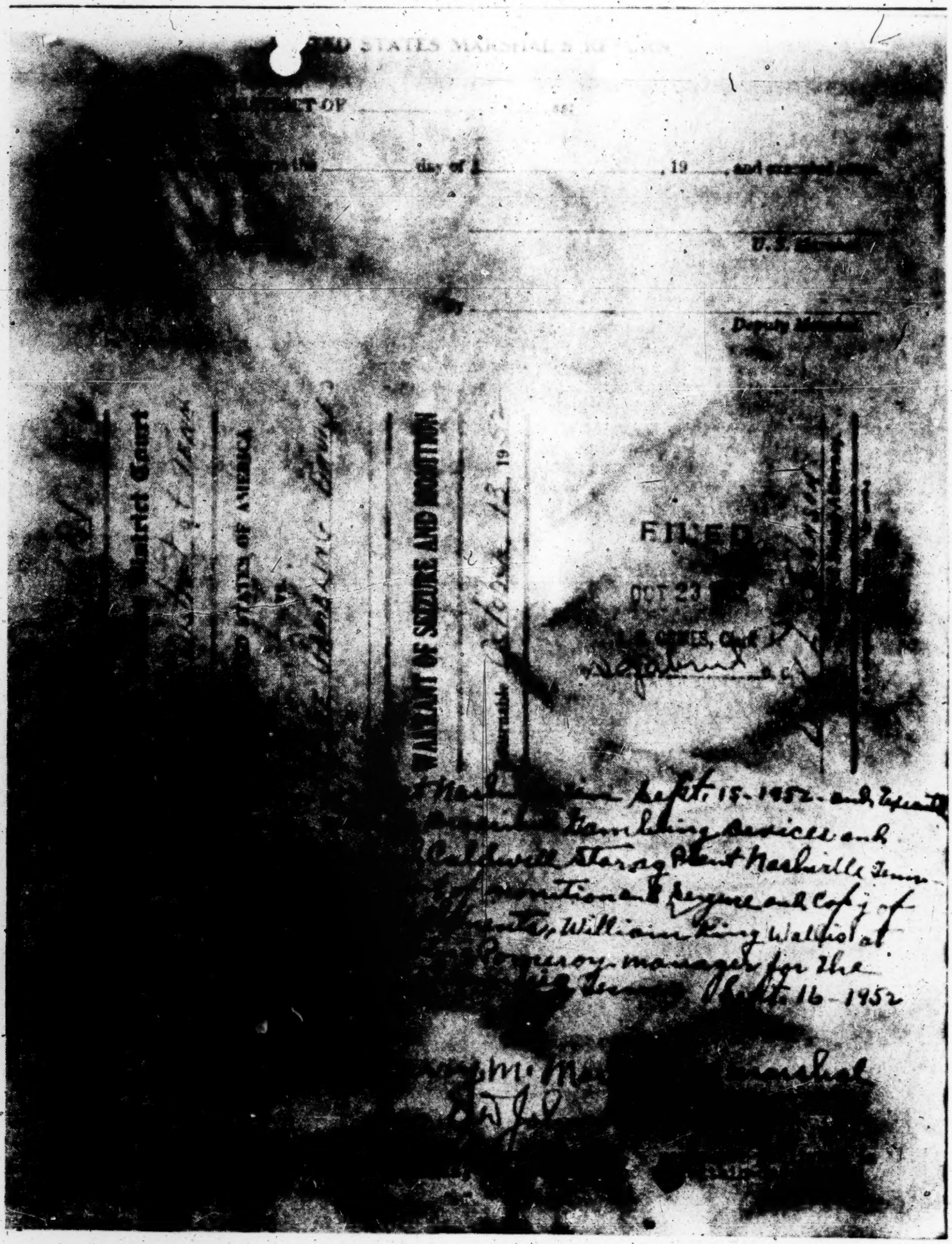

UNITED STATES MARSHAL'S SERVICE

DISTRICT OF

day of , 19 , and executed

U.S. Marshal

By

Deputy Marshal

District Court

STATES OF AMERICA

AFFIDAVIT OF SERVICE AND POSITION

FILED

OCT 23

CLERK, U.S. DIST. COURT

Deputy Clerk

Sept. 15-1952 and Exhibit
Gambling devices and
Caldwell Storage Co. Nashville Tenn
Exhibit and Copy of
William King Wallace at
Company manager for the
Sept. 16-1952

Marshal

5 [File endorsement omitted]

In the United States District Court

[Title omitted]

INTERVENING PETITION—Filed October 13, 1952

To the Honorable Elmer D. Davies, United States District Judge for the Middle District of Tennessee:

And now comes your Petitioner Greymere Country Club of Columbia, Tennessee and files this its intervening petition in the above styled cause, and would respectfully state and show unto the Court as follows:

I

This suit was begun by a Libel of Information filed by the United States Attorney for the Middle District of Tennessee. It is a proceeding in Rem and is filed against the five machines described in the caption hereof. These five machines were bought and paid for by your Petitioner, and Petitioner avers that it has the right to have the forfeiture against said machines remitted and dismissed for the following reasons:

The Libel of Information in this case was based upon Section 3 of Public Law 906 passed by the Congress of the United States and approved by the President on January 2, 1951.

Specifically the Libel of Information was filed and the five machines were seized under and by virtue of Section 3 of the Act, which is as follows:

"Sec. 3. Upon first engaging in business, and thereafter on or before the 1st day of July of each year, every manufacturer of and dealer in gambling devices shall register with the Attorney General his name or trade name, the address of his principal place of business, and the addresses of his places of business in such district. On or before the 1st day of each month every manufacturer of and dealer in gambling devices shall file with the Attorney General an inventory and record of all sales and deliveries of gambling devices as of the close of the preceding calendar month for the place or places of business in the district. The monthly record of sales and deliveries of such gambling devices shall show the mark and number identifying each article together with the name and address of the buyer or consignee thereof and the name and address of the carrier. Duplicate bills or invoices, if complete in the foregoing respects, may be used in filing the record of sales and deliveries.

For the purposes of this Act, every manufacturer or dealer
6 shall mark and number each gambling device so that it is individually identifiable. In cases of sale, delivery, or ship-

ment of gambling devices in unassembled form, the manufacturer or dealer shall separately mark and number the components of each gambling device with a common mark and number as if it were an assembled gambling device. It shall be unlawful for any manufacturer or dealer to sell, deliver, or ship any gambling device which is not marked and numbered for identification as herein provided; and it shall be unlawful for any manufacturer or dealer to manufacture, recondition, repair, sell, deliver, or ship any gambling device without having registered as required by this section, or without filing monthly the required inventories and records of sales and deliveries.

II

Your Petitioner now avers and insists that the above quoted section 3 is unconstitutional and void for the reason that it is in contravention of the Tenth amendment of the Constitution of the United States, such amendment being as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people".

Petitioner states that the Libel of Information filed in this case is based solely upon the proposition that the dealer who sold these machines to Petitioner failed to register with the Attorney General of the United States, as required by Title 15, Section 1173 and that such dealer failed to report the details of said sale to the Attorney General of the United States as required by the same Title and Section.

Petitioner would respectfully represent and show to the Court that the Congress of the United States does not have the power or the authority to pass a law requiring a citizen of Tennessee to register his business with the Attorney General nor to report to the Attorney General the details of sales made by such citizen of Tennessee.

Public Law #906 is in no sense a taxing statute and Section 3 of the Act is clearly an infringement upon the police powers of the State of Tennessee, and your Petitioner now insists that such a power as Section 3 undertakes to give the Government, is not a power delegated to the United States by the Constitution nor is such attempted power prohibited by the Constitution of the United States to the several States. This being true the power to regulate machines and report the details of the sale of machines is a power reserved to the State of Tennessee and therefore your Petitioner insists that Public Act #906 passed January 2, 1951, and that especially Section 3 thereof is unconstitutional and void.

7 III

WHEREFORE, your Petitioner comes into this Honorable Court praying for a judgment as to whether or not said Section 3 of said Public Act #906 passed January 2, 1951 is Constitutional or unconstitutional, and Petitioner prays that your Honor hold said Section 3 unconstitutional; that the seizure of Petitioner's property be declared to have been done pursuant to an unconstitutional act of Congress; and that the United States Marshal of this District be directed by your Honor to release to petitioner said machines described in the caption without costs to your Petitioner.

FRIERSON & QUEENER,
By HORACE FRIERSON,
Attorneys for Petitioner.

Duly sworn to by Floyd B. Bowen. Jurat omitted in printing.

8 In United States District Court for the Middle District of Tennessee Columbia Division

Civil No. 286

UNITED STATES OF AMERICA,

vs.

FIVE GAMBLING DEVICES, labeled in part, "Mills", and bearing Serial numbers 593221, 578827, 583708, 578831, and 581162.

ORAL OPINION

The Court—I agree with Judge Briggle of the United States District Court of the Southern District of Illinois, in his opinion in two libel cases entitled *United States* v. *168 Gambling Devices*, and *United States* v. *48 Gambling Devices*. It does not appear anywhere at all that these machines were ever shipped in interstate commerce after the passage of the act, and if they had not been shipped in interstate commerce, after the passage of the act, Congress would have no right to legislate against them. As pointed out by Judge Briggle Congress might have a right to proceed against the dealer for selling the machines, but this is not a proceeding of that kind. This is a proceeding against the machines themselves, and it not appearing that there is any interstate commerce connected with the seizure, or that the machines were ever shipped in interstate commerce after the passage of the act, Congress has no right to make any regulations as to purely intrastate matters. These machines might very well have been purchased before the passage of the act in question and stored here in the state of Ten-

nessee, and in all probability they were, and shipped after the act in question was passed, to the purchaser at Columbia, Tennessee.

Well, that would be an intrastate shipment, and Congress
9 would have no right to legislate realtive to that matter.

I am of the opinion that the seizure in this case is illegal, that the libel was not justified, and the machines will be ordered returned to the petitioner.

10 In United States District Court for the Middle District of Tennessee Columbia Division

November 19, 1952

Civil No. 286

UNITED STATES OF AMERICA

vs.

FIVE GAMBLING DEVICES, labeled in part, "Mills", and bearing Serial numbers 593221; 578827; 583708, 578831, and 581162

ORDER OF DISMISSAL—Filed November 21, 1952

This cause came on to be heard upon the libel of information filed by the United States of America, and the intervening petition of the Graymere Country Club; and it appearing to the Court that it is agreed that the facts set forth in the libel and the intervening petition are true and correct, the Court after hearing argument, was of the opinion that Section 1173, Title 15, United States Code, as applied in this cause, is unconstitutional.

It is therefore Ordered and Adjudged that the libel be and hereby is dismissed and that the gambling devices seized be returned, to petitioner Graymere Country Club.

10a It further appearing to the Court that the gambling device labeled in part "Mills", and bearing Serial No. 581162, was seized by the United States.

It is hereby Ordered and Adjudged that the libel be amended by striking the gambling device not seized from the caption and body thereof.

ENTER:

(S.) ELMER D. DAVIES
United States District Judge

O.K.

(S.) DICK L. JOHNSON
United States Attorney

(S.) HORACE FRIERSON
Attorney for Intervening Petitioner

NOVEMBER 21, 1952

11 (File endorsement omitted)

In the United States District Court

Libel # 26

UNITED STATES OF AMERICA

vs.

FIVE GAMBLING DEVICES

Before the Hon. Elmer D. Davies, Judge of said Court, at Columbia, Tennessee, on November 19, 1952.

APPEARANCES: James L. Roberts, Asst. U. S. Dist. Atty.
For the Government

Frierson & Queener, For Defendant Graymere Country Club

MEMORANDUM OF THE COURT—Filed December 17, 1952

The COURT: Gentlemen, I am ready to pass on the law of this case of United States against Five Gambling Devices, but it occurs to me, no evidence has been adduced in the case, no stipulation as to what the facts are. Can you stipulate that the facts set out in the answer or the petition are the true facts in this case?

Mr. ROBERTS: If your Honor please, I believe that none of the facts set out in the libel were denied, and would be taken as admitted.

The COURT: The petition sets out certain facts, in the petition. As I understood the facts, these machines were just seized there at the property of the petitioner, the Graymere Club, is that right?

Mr. ROBERTS: That's correct.

The COURT: That's all the evidence the Government would have.

Major FRIERSON: That's all the evidence the Government would have.

The COURT: The petition and pleadings, though, don't con-
12 stitute the evidence. If you are willing to stipulate that those are the facts, I am ready to go ahead and pass on it.

Mr. ROBERTS: Yes, sir, we will stipulate.

Major FRIERSON: That the facts are as stated in the petition and pleadings.

The COURT: I agree with Judge Briggle of the United States District Court of the Southern District of Illinois, in his opinion in two libel cases entitled United States against 178 Gambling Devices, and United States against 48 Gambling Devices. It doesn't appear anywhere at all that these machines were ever shipped in interstate commerce after the passage of the act, and if they hadn't

been shipped in interstate commerce, after the passage of the act, Congress would have no right to legislate against them. As pointed out by Judge Briggle Congress might have a right to proceed against the dealer for selling the machines, but this is not a proceeding of that kind. This is a proceeding against the machines themselves, and it not appearing that there is any interstate commerce connected with the seizure, or that the machines were ever shipped in interstate commerce after the passage of the act, Congress has no right to make any regulations as to purely intrastate matters. These machines might very well have been purchased before the passage of the act in question and stored here in the State of Tennessee, and in all probability they were, and shipped after the act in question was passed, to the purchaser at Columbia, Tennessee. Well, that would be an intrastate shipment, and
13 Congress would have no right to legislate relative to that matter.

I am of the opinion that the seizure in this case is illegal; that the libel was not justified, and the machines will be ordered returned to the petitioner.

Enter. Elmer D. Davies, U. S. District Judge.

14 [File endorsement omitted]

In United States District Court

[Title omitted]

PETITION FOR APPEAL—Filed December 22, 1952

Considering itself aggrieved by the judgment of this court entered November 21, 1952, the United States, plaintiff herein, prays that an appeal be allowed to the Supreme Court of the United States from said judgment and from each and every part thereof; that citation be issued in accordance with law; that the execution of the judgment be stayed pending final disposition of the appeal and that the material parts of the record, proceedings and papers upon which said judgment and decree was based be sent to the Supreme Court of the United States in accordance with the Rules in such case made and provided.

Respectfully submitted,

WALTER J. CUMMINGS, JR.
Solicitor General,
Counsel for Plaintiff.

15 In the United States District Court

[Title omitted]

ORDER ALLOWING APPEAL—Filed December 22, 1952

The United States, having filed its petition praying for an appeal to the Supreme Court of the United States from the judgment of this court in this cause entered November 21, 1952 and from each and every part thereof, and having presented its assignment of errors and prayer for reversal and statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court in such cases made and provided:

Now, Therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that execution of the judgment be stayed until the termination of this appeal.

It is further ordered that citation shall issue in accordance with law.

ELMER D. DAVIES,
Judge of the District Court.

16 Citation in usual form omitted in printing.

17-24 In United States District Court

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYERS FOR REVERSAL—Filed December 22, 1952

The United States, plaintiff in the above-entitled cause, in connection with its appeal to the Supreme Court, hereby files the following assignment of errors upon which it will rely in its prosecution of said appeal from the judgment of the District Court entered November 21, 1952.

The District Court erred:

(1) In dismissing the libel of information for forfeiture.

(2) In holding that 15 U.S.C. 1173 is unconstitutional as applied in this cause.

(3) In holding that Congress does not have the power to declare subject to forfeiture gambling machines sold within the State of Tennessee by a dealer who failed to register and make reports as required by 15 U.S.C. 1173.

Wherefore, plaintiff prays that the judgment of the District Court be reversed and for such other and further relief as the Court may deem fit and proper.

WALTER J. CUMMINGS, JR.,
Solicitor General.

December 19, 1952.

25 Statement required by Paragraph 2, Rule 12 of the Rules of the Supreme Court (Omitted in printing)

26 PROOF OF SERVICE (omitted in printing)

27 PRAECIPE (omitted in printing)

28 In the United States District Court

[Title omitted]

ORDER AMENDING ORDER OF November 21, 1952—Filed December 23, 1952

[File endorsement omitted.]

In the above styled cause, it is ordered that the order entered herein on November 21, 1952, be amended by adding at the end of the first paragraph thereof, the following words:

"in so far as it applies to purely intrastate matters."

This 22nd day of December, 1952.

ELMER D. DAVIES,
United States District Judge.

29-30 Clerk's Certificate to foregoing transcript omitted in printing.

31 In United States District Court

[Title omitted]

DOCKET ENTRIES

Sept. 11, 1952, Libel of Information filed.
Sept. 11, 1952, Warrant of Seizure & Monition issued and returned showing service.
Oct. 13, 1952, Intervening Petition of Greymore Country Club filed.
Nov. 19, 1952, Oral Opinion of the Court filed.
Nov. 21, 1952, Order of Dismissal entered.
Dec. 17, 1952, Memorandum of the Court entered.

Dec. 22, 1952, Petition for Appeal filed.
Dec. 22, 1952, Order Allowing Appeal entered.
Dec. 22, 1952, Citation on Appeal entered.
Dec. 22, 1952, Assignment of Errors and Prayers for Reversal filed.
Dec. 22, 1952, Statement as to Jurisdiction filed.
Dec. 22, 1952, Statement Required by Rule 12 filed.
Dec. 22, 1952, Proof of Service Required by Rule 12 filed.
Dec. 22, 1952, Praecipe filed.
Dec. 23, 1952, Order entered amending Court's Order of Nov. 21, 1952.

32 In the Supreme Court of the United States

October Term, 1952

No. 558

UNITED STATES OF AMERICA

v.

FIVE GAMBLING DEVICES, labeled in part, "Mills," and bearing Serial numbers 593221; 578827; 583708; 578831 and 581162

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF RECORD—Filed February 10, 1953

[File endorsement omitted.]

Pursuant to Rule 13, paragraph 9, of this Court, appellant states that it intends to rely upon the following points:

1. The District Court erred in dismissing the libel of information for forfeiture.
2. The District Court erred in holding that Section 3 of the Act of January 2, 1951 (64 Stat. 1135, 15 U.S.C. 1173) is unconstitutional as applied in this case.
3. The District Court erred in holding that Congress does not have the power to declare subject to forfeiture gambling devices sold within the State of Tennessee by a dealer who failed to register and make reports as required by Section 3 of the Act of January 2, 1951 (*supra*).

Appellant deems all parts of the record as filed in the above entitled case necessary for the consideration of the points to be relied on *except* the following portions:

33-35 1. The citation on appeal (p. 16);
2. Statement as to Jurisdiction (p. 18-24 inclusive);

3. Statement under Rule 12 (p. 25);
4. Proof of Service under Rule 12 (p. 26);
5. Praecipe (p. 27);

WALTER J. CUMMINGS, JR.,
Solicitor General.

February 10, 1953.

36 Supreme Court of the United States
No. 558 ——, October Term, 1952

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—May 25, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

☆ U. S. GOVERNMENT PRINTING OFFICE 1953 801737 1788

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 730

UNITED STATES OF AMERICA, APPELLANT

vs.

ROSCOE DENMARK

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

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257817—53

1 [Caption omitted.]

2 In United States District Court for the Southern District of Georgia, Savannah Division

No. 13393

Vio: T. 15, U. S. C. A. Sec. 1173

UNITED STATES OF AMERICA

v.

ROSCOE DENMARK

Indictment

Filed May 13, 1952

COUNT ONE

The Grand Jury Charges:

That from on or about January 3, 1951, to on or about August 31, 1951, ROSCOE DENMARK did, in the Savannah Division of the Southern District of Georgia, unlawfully, wilfully and knowingly engage in the business of a dealer in gambling devices without having registered with the Attorney General of the United States his name, trade name, and address of his principal place of business, and the addresses of his places of business within the Southern District of Georgia, in violation of Section 1173, Title 15, U. S. C. A.

COUNT TWO

The Grand Jury Further Charges:

That on or about June 30, 1951, within the Savannah Division of the Southern District of Georgia, the said ROSCOE DENMARK, a dealer in gambling devices, having sold and delivered a gambling device, to wit: one Pace Slot machine, to Milton M. Braun, Savannah, Georgia, on or about May 15, 1951, unlawfully, wilfully and knowingly failed to file with the Attorney General of the United States an inventory and record of sales and deliveries of gambling devices as of May 31, 1951 for his place or places of business within the Southern District of Georgia, in violation of Section 1173, Title 15, U. S. C. A.

COUNT THREE

The Grand Jury Further Charges:

That on or about July 31, 1951, within the Savannah Division of the Southern District of Georgia, the said ROSCOE DENMARK, a

dealer in gambling devices, having sold and delivered a gambling device, to wit: one Pace slot machine, to Nash Antonopolo, Savannah, Georgia, on or about June 23, 1951, unlawfully, wilfully and knowingly failed to file with the Attorney General of the United States an inventory and record of sales and deliveries of gambling devices as of June 30, 1951 for his place or places of business within the Southern District of Georgia, in violation of Section 1173, Title 15, U. S. C. A.

COUNT FOUR

The Grand Jury Further Charges:

That on or about August 31, 1951, within the Savannah Division of the Southern District of Georgia, the said ROSCOE DENMARK, a dealer in gambling devices, having sold and delivered thirteen (13) gambling devices, to wit: one Buckley Long Shot gambling device; nine (9) Buckley Track Adds gambling devices, and three (3) Evans Bangtail gambling devices, to Dukes Novelty Company, Savannah, Georgia, on or about July 5, 1951, unlawfully wilfully and knowingly failed to file with the Attorney General of the United States an inventory and record of sales and deliveries of gambling devices as of July 31, 1951, for his place or places of business within the Southern District of Georgia, in violation of Section 1173, Title 15, U. S. C. A.

A True Bill.

(Signed) F. F. BAGGETT,
Foreman.

J. SAXTON DANIEL,
United States Attorney.
(Signed) DONALD H. FRASER.
Assistant United States Attorney.
(*Signed*) JULIAN HARTRIDGE,
Assistant United States Attorney.

4 [File endorsement omitted.]

5 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Motion to dismiss indictment

Filed November 10, 1952

The defendant, Roscoe Danmark, moves that the indictment in the above entitled cause, and each and every count thereof, be dismissed on the following grounds:

1. Title 15, U. S. C., Section 1173 (Act of Congress approved January 2, 1951, Public Law 906, 64 Stat. 1135), upon which the indictment, including all counts thereof, is based, is unconstitutional and invalid for the reasons:

(a) Said Title 15, U. S. C., Section 1173 undertakes by its provisions to require, among other things, that manufacturers of and dealers in gambling devices register with the Attorney General his name or tradename, the address of his principal place of business, and the addresses of his place of business in such district, and to file with the Attorney General a monthly inventory and record of all sales and deliveries of gambling devices for the place or places of business in the district, showing the mark and number identifying each article, together with the name and address of the buyer or consignees thereof, and the name and address of the carrier, and that each gambling device be marked and numbered, which requirements invades the jurisdiction of the State by undertaking to regulate matters local in their nature and wholly intrastate and within the exclusive legislative and police powers of the States and not within the powers delegated to the Congress of the United States by Article 1, Section 8, Clause 3 of the Constitution of the United States relating to the regulation of interstate commerce, and the said provisions of Title 15, U. S. C., 1173 are, for the reasons above shown, in violation of the Tenth Amendment to the Constitution of the United States reserving to the States the powers not delegated to the United States by the Constitution.

6 (b) The provisions of Title 15, U. S. C., Section 1173 have the effect of requiring manufacturers of and dealers in gambling devices to furnish evidence against themselves, in violation of the Fifth Amendment to the Constitution of the United States which provides, among other things, * * * "nor be compelled in any criminal case to be a witness against himself * * *."

2. That Title 15, Section 1173 (Act of Congress approved January 2, 1952, Public Law 906, Section 3) of United States Code is invalid and incapable of enforcement for the following reason:

(a) Said Section requires manufacturers of and dealers in gambling devices to register with the Attorney General his name or tradename, the address of his principal place of business, and the addresses of his place of business "in such district," and fails to designate and identify the district referred to in said statute as "such district."

(b) Said Title 15, Section 1173 is invalid and incapable of enforcement for the reason that it is impossible to determine from the provisions of said statute or from said Act of Congress as a whole what district is referred to by the languages "such district."

(c) That the language "Such district" does not define any area or geographical subdivision and as such is incapable of ascertainment.

3. Defendant moves the Court to dismiss Count I of the said indictment upon the further ground that said Count I and the indictment fails to allege when the defendant first engaged in business.

4. Defendant moves the Court to dismiss Counts 2 and 3 of said indictment upon the further grounds that each of said Counts fail to allege that the transaction therein charged were committed prior to or after the defendant first engaged in business.

5. Defendant moves to dismiss the indictment and each and every count thereof upon the further ground that all of said counts and each of them fail to allege that the defendant was engaged in the business of a dealer in gambling devices in interstate commerce.

7 Wherefore, defendant prays that the grounds of this motion be inquired of by the Court and that the indictment and each count thereof be dismissed.

BRANNEN, CLARK, & HESTER,
By (Signed) PERRY BRANNEN,
(Signed) G. B. EVERITT,
Defendant's Attorneys.

[Proof of service omitted in printing.]

7A In United States District Court for the Southern District of Georgia, Savannah Division

Indictment No. 13393

Vio: Title 15, U. S. C. 1173

UNITED STATES OF AMERICA

v.

ROSCOE DENMARK

Opinion and order dismissing indictment

Filed February 25, 1953

An indictment in four counts was returned against Roscoe Denmark charging violations of Title 15 U. S. C. 1173. The first count charges that defendant was a dealer in gambling devices and failed to register with the Attorney General of the United States. The remaining counts of the indictment charge that the defendant sold and delivered gambling devices to the persons named in the respective counts within the Savannah Division of the Southern District of Georgia and did not file inventories and records of the sales with the Attorney General.

By motion to dismiss the indictment timely filed and presented, the defendant contends that Title 15 U. S. C. 1173 is unconstitutional as being in violation of the Tenth Amendment to the Constitution in so far as it undertakes to regulate transactions purely local in their nature and entirely intrastate and transactions which do not directly affect interstate commerce. It is further contended by the defendant in his motion to dismiss that Title 15 U. S. C. 1173 is too vague, indefinite, and uncertain to be enforceable, particularly with reference to the language "in such district."

As this opinion dealing with the constitutionality of, and application of Title 15 U. S. C. 1173 disposes of the case, no discussion is had as to the other grounds of the motion.

The indictment and all counts thereof is based on Title 15 U. S. C. 1173 (Act of Congress of January 2, 1951.). Section 1172 of this Act prohibits the transportation of gambling devices in interstate commerce. It was passed pursuant to the constitutional power of Congress to regulate interstate commerce. Being penal in characer it must be strictly construed.

That Congress has the power to prohibit and regulate the transportation of gambling devices in interstate commerce is clear, and it may regulate to the extent of affecting such intrastate transactions as directly affect interstate commerce, but to regulate trans-

actions purely intrastate or which only indirectly affect
8 interstate commerce would be exceeding the powers of Congress and would render such action unconstitutional. To come within the powers of Congress to regulate intrastate transactions, such transactions must be such as substantially and directly affect interstate commerce, and to extend the Statute here under consideration to purely intrastate transactions would give to Title 15 Section 1173 of the Act an effect beyond the constitutional powers of Congress. While the following decisions are not binding on me, I think their reasonings are sound.

In the case of United States vs. 5 Gambling Devices, Libel for Forfeiture, in the Northern District of Georgia, Judge Sloan, in considering the Statute here involved, ruled: "It is neither shown, or contended that purely intrastate transactions in gambling devices in any way interfere with or obstruct the regulation of such devices in interstate commerce, and to extend the Act to purely intrastate transactions gives to the Act an effect beyond the constitutional power of Congress. The Act does not apply to intrastate transactions."

The Statute under consideration must be valid, if at all, under the Commerce Clause of the Constitution. The power of Congress under this clause is limited to matters directly affecting interstate or foreign commerce. "The power of Congress under the commerce clause is limited to matters directly affecting interstate or foreign commerce, and can not extend to matters the effect of which, whatever its extent, is indirect." James Walter Carter v. Carter Coal Co. et al., 298 U. S. page 238 (21), see page 297.

In the case of United States of America v. 15 Mills Blue Bell Gambling Machines, et al., Libel in Rem, in the Middle District of Georgia, Judge Conger, in considering the Statute here under consideration, ruled:

"The fifth defense is predicated on the theory that the Act under which these proceedings are brought seeks to regulate intrastate commerce, which is beyond the power of Congress to do. This defense is sustained," and ruling that the Statute involved was unconstitutional for this reason, and for the further reason that it was too vague, indefinite, and uncertain because of the language "in such district" contained in the Statute, there being no named or defined district or area to which the words "in such district" could refer.

9 It is not contended by the counsel for the United States that the defendant was a dealer in interstate commerce, and it is conceded that none of the machines allegedly sold by the defendant were ever transported in interstate commerce and that all of his alleged transactions were had wholly within the State of Georgia. Interstate commerce was not involved and not directly

or indirectly affected by the alleged intrastate transactions on the part of the defendant. The Statute under consideration does not apply to intrastate transactions even should it be deemed constitutional.

It seems clear to the Court that the Statute involved in so far as it undertakes to regulate purely intrastate transactions goes beyond the power of Congress under the commerce clause of the Constitution.

The Court is also of the opinion that the Statute is too vague, indefinite, and uncertain in failing to definitely and clearly designate what is meant by the language "In such district," and being a criminal statute it must be strictly construed.

In accordance with the foregoing opinion, it is

Considered, ordered and adjudged by the Court that the motion of the defendant to dismiss the indictment and all counts thereof be, and the same hereby is, sustained and the indictment and all counts thereof is hereby dismissed.

This the 24th day of February 1953.

(Signed) F. M. SCARLETT,
United States District Judge.

[Title endorsement omitted.]

10–11 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Order amending judgment and opinion

Filed March 26, 1953

Whereas, this Court on the 25th day of February 1953, entered judgment in the above-entitled cause sustaining the defendant's motion to dismiss the indictment and dismissing said indictment; and

Whereas, said judgment recites in the first part of the second paragraph on page three thereof, the following, to wit:

"It is not contended by the counsel for the United States that the defendant was a dealer in interstate commerce, and it is conceded that none of the machines allegedly sold by the defendant were ever transported in interstate commerce and that all of his alleged transactions were had wholly within the State of Georgia."

It being made to appear to the Court that the wording quoted is an incorrect statement as to what transpired, and counsel for the defendant agreeing,

It is the order and judgment of the Court that the judgment heretofore entered in said cause be, and the same is, hereby modified by deleting therefrom the above-quoted words; and that the

following words be inserted in lieu thereof as a part of said judgment, to wit:

"No allegation is made in the indictment as to any of the sales being interstate commerce, and the Assistant District Attorney conceded that there were no interstate sales."

Let this order be filed of record.

This 26th day of March 1953.

(Signed) F. M. SCARLETT,
United States Judge.

12-23 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Notice of appeal

Filed March 26, 1953

The United States hereby appeals to the Supreme Court of the United States from the order of the United States District Court for the Southern Dist ict of Georgia, entered February 25, 1953, dismissing the indictment in the above-entitled case.

(Signed) Robert L. Stern,
ROBERT L. STERN,
Acting Solicitor General,
Department of Justice, Washington, D. C.

Dated March 19, 1953.

24 [Service and appeal papers under Rule 12 omitted in printing.]

25 [Designation of record omitted in printing.]

26 In United States District Court, Savannah Division

[Title omitted.]

Statement of docket entries

1. Indictment returned and filed in open Court on May 26, 1952.
2. Defendant's Motion to Dismiss Indictment filed on November 10th, 1952.
3. Opinion of the Court and order sustaining defendant's motion to dismiss indictment filed on February 25th, 1953.
4. Order of Court amending opinion of the Court entered February 25th, 1953, filed on March 26th, 1953.
5. Notice of Appeal to the Supreme Court of the United States filed by the United States of America on March 26th, 1953.

6. Statement as to Jurisdiction of the Supreme Court of the United States filed on March 26th, 1953.

7. Notice to Appellee of filing of Notice of Appeal, together with acknowledgment of service thereon, filed on March 26th, 1953.

8. Appellant's Designation of the Record on Appeal, together with Appellee's acknowledgment of service thereon, filed on March 26th, 1953.

27 [Clerk's certificate to foregoing transcript omitted in printing.]

29 In the Supreme Court of the United States

No. 730, October Term, 1952

[Title omitted.]
[File endorsement omitted.]

Statement of points to be relied upon and designation of record

Filed May 27, 1953

Pursuant to Rule 13, Paragraph 9, of this Court, appellant states that it intends to rely upon the following points:

1. The District Court erred in holding that Congress cannot, in aid of its power to prohibit the shipping of gambling machines in interstate commerce, require dealers in such machines to register with the Attorney General and report all sales, including intrastate deliveries, pursuant to Section 3, Act of January 2, 1951, 64 Stat. 1135, 15 U. S. C. 1173, Supp. V.

2. The District Court erred in holding that the requirement that the dealer register with the Attorney General the addresses of his places of business "in such district" renders the statute void for vagueness.

3. The District Court erred in dismissing the indictment.

30 Appellant deems the entire record, as filed in the above-entitled case, necessary for the consideration of the points relied upon.

Robert L. Stern,
Robert L. Stern,
Acting Solicitor General.

May 1953.

33 Supreme Court of the United States

No. 730, October Term, 1952

[Title omitted.]

Order noting probable jurisdiction

May 18, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is consolidated with No. 731, United States of America, vs. Braun, for argument, and transferred to the summary docket.

U. S. GOVERNMENT PRINTING OFFICE: 1953

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 731

UNITED STATES OF AMERICA, APPELLANT

vs.

MILTON M. BRAUN

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

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1 [Caption omitted in printing.]

1A In United States District Court for the Southern District of Georgia, Savannah Division

No. 13392

Vio: T. 15, U. S. C., Sec. 1173

UNITED STATES OF AMERICA

v.

MILTON M. BRAUN

INDICTMENT

Filed May 13, 1952

COUNT ONE

The Grand Jury Charges:

That from on or about January 3, 1951, to on or about July 25, 1951 MILTON M. BRAUN did, in the Savannah Division of the Southern District of Georgia, unlawfully, wilfully and knowingly engage in the bisines of a dealer in gambling devices without having registered with the Attorney General of the United States his name, trade name, and address of his principal place of business, and the addresses of his places of business in the Southern District of Georgia, in violation of Section 1173, Title 15, U. S. C. A.

COUNT TWO

The Grand Jury Further Charges:

That on or about March 31, 1951, within the Savannah Division of the Southern District of Georgia, the said MILTON M. BRAUN, a dealer in gambling devices, having sold and delivered two gambling devices, to wit: one Mills slot machine, and one Jennings slot machine, to L. R. Grimm, Savannah, Georgia, on or about February 5, 1951, did, unlawfully, wilfully and knowingly fail to file with the Attorney General of the United States an inventory and record of sales and deliveries of gambling devices as of February 28, 1951, for his place and places of business within the Southern District of Georgia, in violation of Section 1173, Title 15, U. S. C. A.

COUNT THREE

The Grand Jury Further Charges:

On or about March 31, 1951, within the Savannah Division of the Southern District of Georgia, the said MILTON M. BRAUN, a

dealer in gambling devices, having sold and delivered nine (9) gambling devices, to wit: Nine Mills slot machines, to Paul Peters, Savannah, Georgia, on or about February 14, 1951, did, 2 unlawfully, wilfully and knowingly fail to file with the Attorney General of the United States an inventory and record of sales and deliveries of gambling devices as of February 28, 1951, for his place and places of business within the Southern District of Georgia, in violation of Section 1173, Title 15, U. S. C. A.

COUNT FOUR

The Grand Jury Further Charges:

On or about April 30, 1951, within the Savannah Division of the Southern District of Georgia, the said MILTON M. BRAUN, a dealer in gambling devices, having sold and delivered Four (4) gambling devices, to wit: Four Mills slot machines, to Paul Peters, Savannah, Georgia, on or about March 9, 1951, did, unlawfully and knowingly fail to file with the Attorney General of the United States an inventory and record of sales and deliveries of gambling devices as of March 31, 1951, for his place and places of business within the Southern District of Georgia, in violation of Section 1173, Title 15, U. S. C. A.

COUNT FIVE

The Grand Jury Further Charges:

On or about June 30, 1951, within the Savannah Division of the Southern District of Georgia, the said MILTON M. BRAUN, a dealer in gambling devices, having sold and delivered a gambling device, to wit: a Whattling slot machine, to T. C. Smith, Savannah, Georgia, on or about May 10, 1951, did, unlawfully, wilfully and knowingly fail to file with the Attorney General of the United States an inventory and record of sales and deliveries of gambling devices as of May 31, 1951, for his place and places of business within the Southern District of Georgia, in violation of Section 1173, Title 15, U. S. C. A.

A True Bill.

(Signed) F. F. BAGGETT,
Foreman.

J. SAXTON DANIEL,
United States Attorney.

(Signed) Donald H. Fraser,
DONALD H. FRASER,
Assistant United States Attorney.

(Signed) Julian Hartridge,
JULIAN HARTRIDGE,
Assistant United States Attorney.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Motion to dismiss

Filed October 31, 1952

Now comes the defendant in the above entitled cause and moves to dismiss the indictment and for grounds thereof shown and says:

1st: (a) The said law upon which said indictment is based, to wit; Title 15, U. S. C. Section 1173, is unconstitutional in that it requires persons to furnish information on which a criminal case could be made in violation of the Fifteenth Amendment to the United States Constitution to wit: "No person shall be compelled in any criminal case to be a witness against himself."

(b) Said law, construed in connection with the indictment which does not allege interstate commerce or any act of the defendant affecting interstate commerce, is unconstitutional in that it violates the Tenth Amendment to the United States Constitution, to wit: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

2nd: The said indictment fails to allege that defendant first engaged in business on January 2, 1951 and therefore was under no duty to report the alleged sales in Counts Two, Three, Four, and Five on the dates alleged.

3rd: Subject to the foregoing grounds to dismiss the whole indictment and all Five Counts thereof defendant moves to dismiss Counts Two, Three, Four, and Five and for grounds thereof says that these alleged transactions are but one offense all of which are embraced in Count One of the indictment and to allow all Five Counts to stand would place defendant in double jeopardy in violation of the Fifth Amendment of the United States Constitution, to wit: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

(Signed) MYRICK & MYRICK,
Defendant's Attorneys.

[File endorsement omitted.]

5 In the United States District Court for the Southern District of Georgia, Savannah Division

Indictment No. 13392

Violation: Title 15, U. S. C., Section 1173

UNITED STATES OF AMERICA

v.

MILTON M. BRAUN

Opinion and judgment

Filed February 26, 1953

STATEMENT OF THE CASE

An indictment in five counts was returned against MILTON M. BRAUN in the District Court of the United States for the Southern District of Georgia, Savannah Division, charging a violation of Title 15, U. S. C. Section 1173.

The first count charges that the defendant was a dealer in gambling devices and failed to register with the Attorney General of the United States.

The other four counts of the Indictment charged that the defendant on various dates sold amounts of gambling devices to named persons, and failed to file an inventory and record of sales and deliveries with the Attorney General.

The defendant filed a motion to dismiss the indictment, on three grounds—one of the grounds being that the Act, Section 1173, did not extend to purely intra-state transactions which do not directly affect interstate commerce, but if the Act was intended to apply to purely intra-state transactions, then the same was unconstitutional because of the tenth amendment to the Constitution. As this opinion deals with the application of the said Act to purely intra-state transactions and the constitutionality thereof under the state of facts as alleged in the indictment, no discussion is had on the other grounds of the motion to dismiss.

The indictment and all counts thereof are based on Title 15, U. S. C., Section 1173. No allegation is made in the indictment as to any of the sales being interstate commerce, and the Assistant District Attorney conceded that there were no interstate sales.

OPINION AND JUDGMENT OF THE COURT

The Act in question, to wit, Title 15, 1171–1175, was passed pursuant to the power of Congress to regulate interstate commerce.

There is no question but that Congress has power to prohibit the transportation of gambling devices in interstate commerce. It is equally true that Congress has the power to regulate intra-state transactions which directly affect interstate commerce. But the power of Congress to regulate these matters cannot extend
6 to matters the effect of which, whatever its extent, is indirect. (See James Walter Carter v. Carter Coal Co., et al., 298 U. S. Page 238 (21), also see page 297.)

In the case of United States v. Five Gambling Devices, Libel for Forfeiture, in the Northern District of Georgia, Judge Sloan, in considering the Statute here involved, ruled: "It is neither shown nor contended that purely intra-state transactions in gambling devices in any way interfere with or obstruct the regulation of such devices in interstate commerce, and to extend the Act to purely intra-state transactions gives to the Act an effect beyond the constitutional power of Congress. The Act does not apply to intra-state transactions."

In the case of United States of America v. 15 Mills Blue Bell Gambling Machines, et al., Libel in Rem, in the Middle District of Georgia, Judge Cooper, in considering the Statute here under consideration, ruled: "The fifth defense is predicated on the theory that the Act under which these proceedings are brought seeks to regulate intra-state commerce, which is beyond the power of Congress to do. This defense is sustained."

In view of the above decisions, and in view of the fact that there are no interstate transactions involved in this case, and the transactions involved in this case were purely intra-state transactions, the Court therefore is of the opinion that Section 1173 has no application to the defendant in this case, since the Statute under consideration does not apply to intra-state transactions which do not directly affect interstate commerce.

It seems clear to the Court that the Statute involved, in so far as it undertakes to regulate purely intra-state transactions which do not directly affect interstate commerce, goes beyond the power of Congress under the Commerce Clause of the Constitution.

In accordance with the foregoing opinion,

It is considered, ordered, and adjudged by the Court, That the motion of the defendant to dismiss the indictment and all the counts thereof, be, and the same is hereby sustained, and said indictment and all counts thereof is hereby dismissed.

This 25th day of February 1953.

(Signed) F. M. SCARLETT,
United States Judge.

[File endorsement omitted.]

7-9 In United States District Court

[Title omitted.]

Notice of appeal

Filed March 26, 1953

The United States hereby appeals to the Supreme Court of the United States from the order of the United States District Court for the Southern District of Georgia, entered February 26, 1953, dismissing the indictment in the above-entitled case.

(Signed) Robert L. Stern,
ROBERT L. STERN,
Acting Solicitor General,
Department of Justice, Washington, D. C.

Dated March 19, 1953.
[File endorsement omitted.]

11 [Service of appeal papers under Rule 12, omitted in printing.]

12 [Designation of record on appeal, omitted in printing.]

13 In United States District Court

[Title omitted.]

Statement of docket entries

1. Indictment returned and filed in open Court on May 13th, 1952.
2. Defendant's Motion to Dismiss Indictment filed on October 31st, 1952.
3. Opinion of the Court and Judgment sustaining Motion to Dismiss indictment filed on February 26th, 1953.
4. Notice of Appeal to the Supreme Court of the United States filed on March 26th, 1953.
5. Statement as to Jurisdiction of Supreme Court of the United States on Appeal filed on March 26th, 1953.
6. Notice to appellee of filing of Notice of Appeal, together with acknowledgment of service thereon, filed on March 26th, 1953.
7. Appellant's Designation of Record on Appeal, together with acknowledgment of service thereon, filed on March 26th, 1953.

14 [Clerk's certificate to foregoing transcript omitted in printing.]

16 In the Supreme Court of the United States

No. 731, October Term, 1952

[Title omitted.]

Statement of points to be relied upon and designation of record

Filed May 27, 1953

Pursuant to Rule 13, paragraph 9, of this Court, appellant states that it intends to rely upon the following points:

1. The District Court erred in holding that Congress cannot, in aid of its power to prohibit the shipping of gambling machines in interstate commerce, require dealers in such machines to register with the Attorney General and report all sales, including intrastate deliveries, pursuant to Section 3, Act of January 2, 1951, 64 Stat. 1135, 15 U. S. C. 1173, Supp. V.

2. The District Court erred in dismissing the indictment.

Appellant deems the entire record, as filed in the above-entitled case, necesary for the consideration of the points relied upon.

Robert L. Stern,
Robert L. Stern,
Acting Solicitor General.

May 1953.

[File endorsement omitted.]

19 Supreme Court of the United States

No. 731, October Term, 1952

[Title omitted.]

Order noting probable jurisdiction

May 18, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is consolidated with No. 730, United States of America, vs. Denmark, for argument, and transferred to the summary docket.

No. 14

17

RECEIVED FOR ENTRY
10:00 A.M.
Nov. 21, 1952
L. B. Ormes, Clerk
By: Guy W. Cooper, D.C.

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

November 19, 1952

Civil No. 286

UNITED STATES OF AMERICA

vs.

FIVE GAMBLING DEVICES, labeled in part, "Mills", and bearing Serial numbers 593221; 578827; 583708, 578831, and 581162

Order

This cause came on to be heard upon the libel of information filed by the United States of America, and the intervening petition of the Graymere Country Club; and it appearing to the Court that it is agreed that the facts set forth in the libel and the intervening petition are true and correct, the Court after hearing argument, was of the opinion that Section 1173, Title 15, United States Code, as applied in this cause, is unconstitutional.

It is therefore ORDERED and ADJUDGED that the libel be and hereby is dismissed and that the gambling devices seized be returned, to petitioner Graymere Country Club.

It further appearing to the Court that the gambling device labeled in part "Mills", and bearing Serial No. 581162, was not seized by the United States.

It is hereby ORDERED and ADJUDGED that the libel be amended by striking the gambling device not seized from the caption and body thereof.

ENTER:

/s/ ELMER D. DAVIES
United States District Judge

O.K.

/s/ DICK L. JOHNSON
United States Attorney

/s/ HORACE FRIERSON
Attorney for Intervening Petitioner

RECEIVED FOR ENTRY
12:25 a.m.
D DEC 23 1952
L. B. ORMES, *Clerk*
By *R. D. Hall, D. C.*

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

Civil No. 286

UNITED STATES OF AMERICA

vs.

FIVE GAMBLING DEVICES, labeled in part, "Mills" and bearing serial numbers 593221; 578827; 583708; 578831; and 581162

In the above styled cause, it is ordered that the order entered herein on November 21, 1953, be amended by adding at the end of the first paragraph thereof, the following words:

"in so far as it applies to purely intrastate matters."

This 22nd day of December, 1952.

/s/ ELMER D. DAVIES
United States District Judge

Dec. 23, 1952 vol. 4 page 6

U.S. GOVERNMENT PRINTING OFFICE 1953—243733/9 0 1171

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Civil No. 286

UNITED STATES OF AMERICA

v.

FIVE GAMBLING DEVICES, LABELED IN PART, "MILLS," AND BEARING SERIAL NUMBERS 593221, 578827; 583708, 578831 AND 581162

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court in this cause dismissing the libel of information.

OPINION BELOW

The order of the District Court has not yet been reported. A copy thereof and of the oral opinion of the court is annexed hereto in the Appendix.[1]

[1] The opinion of the District Court for the Southern District of Illinois mentioned in the oral opinion of the District Court in this cause, is reported at 107 F. Supp. 394.

JURISDICTION

The order of the District Court dismissing the libel of information on the ground that "Section 1173, Title 15, United States Code, as applied in this cause, is unconstitutional" was entered November 21, 1952. The jurisdiction of the Supreme Court to review on direct appeal the judgment of a District Court holding an Act of Congress unconstitutional in any civil action to which the United States is a party is conferred by 28 U.S.C. 1252. See also 28 U.S.C. 2101. The applicability of that section to a judgment holding an Act of Congress unconstitutional as applied is established by *Fleming* v. *Rhodes,* 331 U.S. 100.

QUESTION PRESENTED

Whether, in aid of its admitted power to prohibit the shipping of gambling machines in interstate commerce, Congress may require all dealers in such machines to register and report details of the sales, and provide for the forfeiture of machines sold by unregistered dealers, whether or not the dealer sold the machines in interstate commerce.

STATUTE INVOLVED

The Act of January 2, 1951, 64 Stat. 1134 (15 U.S.C. 1171-1177, Supp. V), provides in pertinent part as follows:

That as used in this Act—

(a) The term "gambling device" means—

(1) any so-called "slot machine" or any other machine or mechanical device an es-

sential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device.

* * * * *

Sec. 2. It shall be unlawful knowingly to transport any gambling device to any place outside of such State, the District of Columbia, or possession: Provided, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section.

* * * * *

Sec. 3. Upon first engaging in business, and thereafter on or before the 1st day of July of each year, every manufacturer of and dealer in gambling devices shall register with the Attorney General his name or trade name, the address of his principal place of business, and the addresses of his places of business in such district. On or before the last day of each month every manufacturer of and dealer in gambling devices shall file with the Attorney General an inventory and record of all sales and deliveries of gambling devices as of the close of the preceding calendar month for the place or places of business in the district. The monthly record of sales and deliveries of such gambling devices shall show the mark and number identifying each article together with the name and address of the buyer or consignee thereof and the name and address of the carrier. Duplicate bills or invoices, if complete in the foregoing respects, may be used in filing the record of sales and deliveries. For the purposes of this Act, every manufacturer or dealer shall mark and number each gambling device so that it is individually identifiable. In cases of sale, delivery, or shipment of gambling devices in unassembled form, the manufacturer or dealer shall separately mark and number the components of each gambling device with a common mark and number as if it were an assembled gambling device. It shall be unlawful for any manufacturer or dealer to sell, deliver, or ship any gambling device which is not marked and numbered for identification as herein pro-

vided; and it shall be unlawful for any manufacturer or dealer to manufacture, recondition, repair, sell, deliver, or ship any gambling device without having registered as required by this section, or without filing monthly the required inventories and records of sales and deliveries.

* * * * *

Sec. 5. It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of title 18 of the United States Code or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of title 18 of the United States Code.

Sec. 6. Whoever violates any of the provisions of sections 2, 3, 4, or 5 of this Act shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Sec. 7. Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in violation of the provisions of this Act shall be seized and forfeited to the United States. All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the

proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred under the provisions of this Act, insofar as applicable and not inconsistent with the provisions hereof: *Provided*, That such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of gambling devices under this Act by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

* * * * *

STATEMENT

In September 1952, the United States filed, in the District Court for the Middle District of Tennessee, a libel of information under 15 U.S.C. 1177 (Section 7, *supra*), for the forfeiture of the above gambling machines, alleging that they had been sold to the Graymere Country Club in Columbia Tennessee, in violation of 15 U.S.C. 1173 (Section 3, *supra*), by dealers in gambling devices who had failed to register with the Attorney General, as required by 15 U.S.C. 1173 and to make the reports required by that section. The Country Club intervened as claimant and moved to dismiss the libel

on the ground that 15 U.S.C. 1173, as applied to a sale in Tennessee by a citizen of Tennessee, was unconstitutional as in contravention of the reserved powers of the States.

The District Court sustained the motion, holding Section 1173 unconstitutional as applied in this cause. In its oral opinion, the District Court stated:

> * * * It does not appear anywhere at all that these machines were ever shipped in interstate commerce after the passage of the act, and if they had not been shipped in interstate commerce, after the passage of Act, Congress would have no right to legislate against them. As pointed out by Judge Briggle[2] Congress might have a right to proceed against the dealer for selling the machines, but this is not a proceeding of that kind. This is a proceeding against the machines themselves, and it not appearing that there is any interstate commerce connected with the seizure, or that the machines were ever shipped in interstate commerce after the passage of the Act, Congress has no right to make any regulations as to purely intrastate matters. * * *

---

[2] The opinion referred to is that of the District Court for the Southern District of Illinois in the case of *United States* v. *178 Gambling Devices*, 107 F. Supp. 394. There the court stated that, while the registration and report provisions of Section 1173 might well be valid, it would not construe the forfeiture provisions of Section 1177 as applying to machines which had never entered interstate commerce since to do so would raise a question of constitutionality. Since the decision there was based on a construction of the statute, the appeal therein is being taken to the Court of Appeals.

> I am of the opinion that the seizure in this case is illegal, that the libel was not justified, and the machines will be ordered returned to the petitioner.

The order entered in this cause, however, held unconstitutional Section 1173 (Section 3, *supra*) the registration and report section, rather than Section 1177 (Section 7, *supra*), the forfeiture section.

The Question Is Substantial

The decision below seriously emasculates the congressional policy of prohibiting the interstate transportation of gambling machines to states where use thereof is forbidden.

The power of Congress to aid state law enforcement by prohibiting the use of the channels of interstate commerce to contravene state policy is established. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 147; *Lottery Case*, 188 U. S. 321.

It is equally well established that, in aid of its power to regulate interstate commerce, Congress may regulate "those activities intrastate which so affect interstate commerce or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate commerce." *Wickard* v. *Filburn*, 317 U. S. 111, 124. See also *United States* v. *Walsh*, 331 U. S. 432; *United States* v. *Frankfort Distilleries*, 324 U. S. 293; *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110; *United States* v. *Darby*, 312 U. S. 100, 117-118.

It was under this well established power that Congress acted in requiring all manufacturers and dealers to register and make the reports required by Section 1173 (Section 3, *supra*). In a report on the bill (H. Rep. No. 2769, 81st Cong., 2d sess., p. 4) it was stated that those favoring the legislation "pointed, particularly, to the existence of nation-wide crime syndicates which are securing a large share of their revenue from the operation of slot machines and other gambling machines." Congress evidently felt that among manufacturers and dealers in machines, interstate and intrastate transactions were so commingled that registration of and reports from all dealers and manufacturers were necessary for any effective regulation of the interstate aspects of the business. Although only interstate shipments are prohibited, effective enforcement of this prohibition depends upon information which will enable all slot machines to be traced, since a dealer may dispose of machines either interstate or intrastate. Information as to intrastate transactions has frequently been required when needed for the effective enforcement or regulation of interstate commerce. *United States* v. *Darby*, 312 U. S. 100, 124; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 42.

Since, therefore, the registration and report provisions were a legitimate exercise of the congressional power to control interstate commerce in gambling devices, the District Court was in error in dismissing the libel for forfeiture. Obviously, if

Congress could impose the registration requirements, it could provide sanctions for noncompliance therewith. One such sanction is the criminal penalty for noncompliance imposed in Section 6, *supra;* another recognized sanction is forfeiture of an article handled in contravention of law. *United States* v. *One Ford Coupe Automobile*, 272 U. S. 317, 329-333; *United States* v. *Stowell*, 133 U. S. 1. The moment the article was sold by an unregistered dealer, it became property used in violation of the Act and under Section 7, *supra*, title immediately passed to the United States. As this Court stated in the *Stowell* case at pp. 16-17:

> By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.

Forfeiture is merely a means of enforcing a duty imposed by Congress. Since, as we have shown, that duty could validly be imposed, the sanction for noncompliance therewith is also valid.

It is submitted that the decision of the District Court in the instant case is erroneous and that the question presented by this appeal is a substantial one which should be settled by the Supreme Court.

Respectfully submitted,

WALTER J. CUMMINGS, JR.,
Solicitor General.

Dated: December 19, 1952.

APPENDIX

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE COLUMBIA DIVISION

Civil No. 286

UNITED STATES OF AMERICA

vs.

FIVE GAMBLING DEVICES

Labeled in part, "Mills", and bearing Serial numbers 593221, 578827, 583708, 578831, and 581162

ORAL OPINION

THE COURT—I agree with Judge Briggle of the United States District Court of the Southern District of Illinois, in his opinion in two libel cases entitled *United States v. 78 Gambling Devices*, and *United States* v. *48 Gambling Devices*. It does not appear anywhere at all that these machines were ever shipped in interstate commerce after the passage of the act, and if they had not been shipped in interstate commerce, after the passage of the act, Congress would have no right to legislate against them. As pointed out by Judge Briggle Congress might have a right to proceed against the dealer for selling the machines, but this is not a proceeding of that kind. This is a proceeding against the machines themselves, and it not appearing that there is any interstate commerce connected with the seizure, or that the machines were ever shipped in interstate commerce after the passage of the act, Congress has no right to make any reg-

ulations as to purely intrastate matters. These machines might very well have been purchased before the passage of the act in question and stored here in the state of Tennessee, and in all probability they were, and shipped after the act in question was passed, to the purchaser at Columbia, Tennessee. Well, that would be an intrastate shipment, and Congress would have no right to legislate relative to that matter.

I am of the opinion that the seizure in this case is illegal, that the libel was not justified, and the machines will be ordered returned to the petitioner.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DIVISION OF TENNESSEE, COLUMBIA DIVISION

No. 286

UNITED STATES OF AMERICA

vs.

FIVE GAMBLING DEVICES

(Libel)

Before the Hon. Elmer D. Davies, Judge of said Court, at Columbia, Tennessee, on November 19, 1952.

APPEARANCES:

James L. Roberts, Asst. U. S. Dist. Atty., for the Government.

Frierson & Queener, for Defendant Graymere Country Club.

THE COURT: Gentlemen, I am ready to pass on the law on this case of United States against Five

Gambling Devices, but it occurs to me, no evidence has been adduced in the case, no stipulation as to what the facts are. Can you stipulate that the facts set out in the answer or the petition are the true facts in this case?

MR. ROBERTS: If your Honor please, I believe that none of the facts set out in the libel were denied, and would be taken as admitted.

THE COURT: The petition sets out certain facts, in the petition. As I understood the facts, these machines were just seized there at the property of the petitioner, the Graymere Club, is that right?

MR. ROBERTS: That's correct.

THE COURT: That's all the evidence the Government would have.

MAJOR FRIERSON: That's all the evidence the Government would have.

THE COURT: The petition and pleadings, though, don't constitute the evidence. If you are willing to stipulate that those are the facts, I am ready to go ahead and pass on it.

MR. ROBERTS: Yes, sir, we will stipulate.

MAJOR FRIERSON: That the facts are as stated in the petition and pleadings.

THE COURT: I agree with Judge Briggle of the United States District Court of the Southern District of Illinois, in his opinion in two libel cases entitled United States against 178 Gambling Devices, and United States against 48 Gambling Devices. It doesn't appear anywhere at all that these machines were ever shipped in interstate commerce after the passage of the act, and if they hadn't been shipped in interstate commerce, after the passage of the act, Congress would have no right to legislate

against them. As pointed out by Judge Briggle Congress might have a right to proceed against the dealer for selling the machines, but this is not a proceeding of that kind. This is a proceeding against the machines themselves, and it not appearing that there is any interstate commerce connected with the seizure, or that the machines were ever shipped in interstate commerce after the passage of the act, Congress has no right to make any regulations as to purely intrastate matters. These machines might very well have been purchased before the passage of the act in question and stored here in the State of Tennessee, and in all probability they were, and shipped after the act in question was passed, to the purchaser at Columbia, Tennessee. Well, that would be an intrastate shipment, and Congress would have no right to legislate relative to that matter.

I am of the opinion that the seizure in this case is illegal; that the libel was not justified, and the machines will be ordered returned to the petitioner.

—— ELMER D. DAVIES,
U. S. District Judge.

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In the Supreme Court of the United States

October Term, 1953

No. 14

UNITED STATES OF AMERICA, *Appellant*

v.

FIVE GAMBLING DEVICES, LABELED IN PART, "MILLS", AND BEARING SERIAL NUMBERS 593,221; 578,827; 583,708; 578,831; AND 581,162

On Appeal from the United States District Court for the Middle District of Tennessee

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the District Court (R. 5-8) are not reported.

JURISDICTION

The order of the District Court dismissing the libel was entered on November 21, 1952 (R. 6). An amendment to the order was entered on December 22, 1952 (R. 10). A notice of appeal was filed on December 22, 1952 (R. 8), and on May 25, 1953, this Court noted probable jurisdiction (R. 12). The jurisdiction of the Supreme Court to review on direct appeal the judgment of a district court holding an Act of Congress unconstitutional in any civil action to which the United States is a party is conferred by 28 U.S.C. 1252. See also 28 U.S.C. 2101.

QUESTION PRESENTED

Whether the remedy of forfeiture may be constitutionally imposed against gambling devices sold in violation of the reporting and registration requirements of Section 3 of the Act of January 2, 1951, without proof of prior unlawful interstate transportation.

STATUTE INVOLVED

The statute involved (64 Stat. 1134, 15 U.S.C. (Supp. V) 1171, *et seq.*) is set forth in the Appendix to the Government's brief in Nos. 40 and 41. The pertinent provisions are quoted at p. 7, *infra*.

STATEMENT

On September 11, 1952, a libel of information was filed against five gambling devices (R. 1). The libel alleges that the machines were illegally sold

in July and October 1951, by Edwin Haley Clement and William King Wallis, doing business as Automatic Music Company, to the Greymere Country Club, Columbia, Tennessee, in violation of Section 3 of the Act of January 2, 1951. It was alleged that Clement and Wallis, being dealers in gambling devices within the meaning of Section 3 of that Act, had both failed to register under the Act and to render the reports giving the details of the sale of the devices to the Attorney General, as required by Section 3 thereof. It was further alleged that the devices were seized by federal agents on March 3, 1953, at the Greymere Country Club, Columbia, Tennessee, under the forfeiture provisions of the Act (Section 7). The devices are described by the serial number and the manufacturer's name affixed to each.

On October 13, 1952, the Greymere Country Club of Columbia, Tennessee, filed an intervening petition (R. 3-5) which, while not denying that the machines were sold to it by an unregistered dealer who failed to report the details of the transaction to the Attorney General as required by Section 3, alleges that Section 3 is unconstitutional and void under the Tenth Amendment of the Constitution, and that (R. 4) "* * * the Congress of the United States does not have the power or the authority to pass a law requiring a citizen of Tennessee to register his business with the Attorney General nor to report to the Attorney General the details of sales made by such citizen of Tennessee."

The facts as alleged in the libel of information were stipulated on the trial of the case which was held on November 19, 1952 (R. 7-8).

The District Court dismissed the libel on the ground that Section 3 of the Act was unconstitutional "in so far as it applies to purely intrastate matters" (R. 9, 10). The opinion of the District Court states that while (R. 5, 8) "* * * Congress might have a right to proceed against the dealer for selling the machines, * * *" it could not forfeit the machines themselves without a showing that "* * * there is any interstate commerce connected with the seizure, or that the machines were ever shipped in interstate commerce after the passage of the act * * *."

SPECIFICATION OF ERROR TO BE URGED

The Court below erred in holding that slot machines sold in violation of Section 3 of the Act of January 2, 1951, could not be forfeited to the United States if they had not been unlawfully transported in interstate commerce.

SUMMARY OF ARGUMENT

The forfeiture of slot machines sold by a dealer who has not complied with the registration and reporting requirements contained in Section 3 of the Slot Machine Act is a reasonable means of enforcing that provision. Since, as we have shown in our brief in the *Denmark* and *Braun* cases, Nos. 40 and 41, Section 3 may validly be applied to all

dealers in machines, including those not in interstate commerce, enforcement of that section through forfeitures may appropriately be given the same scope. Furthermore, the purpose of the statute is to keep the machines themselves out of states which do not want them, and this can best be done by seizing the machines. Failure to comply with the informational requirements will make it difficult or impossible to tell which machines have been illegally transported. Forfeiture of all machines illegally sold by dealers in violation of Section 3 is thus a reasonable method whereby Congress can prevent such dealers from gaining an advantage from their own wrongdoing and frustrating the statutory provisions which enable machines illegally transported and other machines to be distinguished. There is ample precedent for using the remedy of forfeiture to enforce informational requirements. *United States* v. *Stowell*, 133 U.S. 1; *Dobbin's Distillery* v. *United States*, 96 U.S. 395. And the cases also established that forfeiture is not barred because the property may have been transferred to an innocent person.

ARGUMENT

Congress May Constitutionally Provide for the Forfeiture of Slot Machines Sold in Violation of the Informational Requirements Contained in Section 3 of the Slot Machine Statute Irrespective of Whether the Machines Have Been Unlawfully Transported in Interstate Commerce

In the Government's brief in *United States* v. *Denmark* and *Braun*, Nos. 40 and 41, we have argued that the informational requirements of the statute forbidding the interstate transportation of slot machines were constitutional as applied to dealers who may not themselves have engaged or transported machines in interstate commerce. This case involves the right of the Government to seize slot machines sold by dealers who have failed to comply with these provisions. The district court, following the opinion of Judge Briggle in *United States* v. *178 Gambling Devices*, 107 F. Supp. 394 (S.D. Ill.), expressed the view that Congress might have the right to proceed against the dealer (R. 5),[1] but held that the commerce power did not extend to forfeiture of machines which had not been shipped in interstate commerce since the passage of the Act.

As pointed out in our brief in the *Denmark* and *Braun* cases, Section 2 of the statute forbids the interstate transportation of gambling devices into states not exempting themselves from the prohi-

[1] Judge Briggle plainly, and the court below inferentially, thus disagreed with the decisions of the district court in the *Denmark* and *Braun* cases.

bition. Section 3 requires dealers in such devices to register annually with the Attorney General and to file monthly their inventories and records of sales and deliveries. The last sentence of Section 3 provides in part:

> and it shall be unlawful for any manufacturer or dealer to manufacture, recondition, repair, sell, deliver, or ship any gambling device without having registered as required by this section, or without filing monthly the required inventories and records of sales and deliveries.

Section 7 then provides:

> Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in violation of the provisions of this Act shall be seized and forfeited to the United States. All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, * * * shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this Act, insofar as applicable and not inconsistent with the provisions hereof: * * *

The libel of information in this case avers (R. 1) that certain named dealers who had failed to register, as required by Section 3, sold the five gam-

bling devices in question to the intervenor without reporting the details of the sales, as also required by Section 3. The sales were therefore in violation of the last provision of Section 3, quoted above. And in such circumstances the forfeiture provision of Section 7 is applicable, since the gambling devices have been "sold * * * in violation of the provisions of this Act."

Our brief in the *Denmark* and *Braun* cases argues that Congress may choose any appropriate means for the effectuation of the prohibition against transporting gambling devices in interstate commerce, and that to require registration and reports from all dealers in such devices, whether themselves in interstate commerce or not, is a means reasonably adapted to the enforcement of the interstate prohibition. This brief rests in large part upon the propositions there advanced, and is premised upon their acceptance. Those principles go a long way toward establishing the constitutionality of the forfeiture provision here involved.

1. Forfeiture Is a Reasonable Means of Enforcing Section 3.

Section 7, the forfeiture provision, like Section 6, the criminal provision involved in the *Denmark* and *Braun* cases, is a method of enforcing Section 3. If Congress can, upon the ground that the information demanded by Section 3 is necessary to enforcement of the interstate prohibition, impose one sanction upon dealers, whether or not in interstate commerce, who fail to register or report, it

can impose the other. Both are well-recognized methods of law enforcement. "Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforcible by civil proceedings since the original revenue law of 1789." *Helvering* v. *Mitchell*, 303 U.S. 391, 400. And "in the imposition of penalties for the violation of its rules, Congress has a wide discretion. Sanctions may be of various types." *Electric Bond and Share Co.* v. *Securities and Exchange Commission*, 303 U.S. 419, 442. The sanction of forfeiture imposed by Section 7 has as close a relation to interstate commerce, or to effectuating the policy of keeping slot machines out of such commerce, as has the criminal sanction in Section 6.

The sanction of forfeiture is plainly a method of enforcement which will aid in insuring compliance with Section 3. Dealers may well be induced to register and report by the possibility that their machines may be seized if they fail to do so. They may fear the summary forfeiture procedure which deprives them of business assets immediately more than future criminal penalties. Possibly of greater significance, if potential buyers of slot machines know that the Government can seize any machines purchased from unregistered dealers they will be likely to buy only from registered dealers who have complied with Section 3. In short, the sanction of seizure and forfeiture may be the most effective

means of procuring compliance with Section 3. And since that section lawfully applies to all dealers, whether or not the machines or the dealers have been interstate commerce, the sanction must have the same scope as the provision it is enforcing.

2. Forfeiture of All Unreported Machines, Whether or Not in Interstate Commerce, Is Necessary to Prevent Dealers From Frustrating the Reporting System and Thereby Making It Impossible to Identify the Interstate Machines.

In addition, the reason for making dealers report as to *all* slot machines also justifies the sanction of forfeiture for all such machines. A complete and accurate system of reports is necessary so that the Government can tell which machines have been unlawfully transported interstate. The absence of such reports will make it impossible—or at least more difficult—to determine the status of the particular machines. To hold, therefore, as has the court below, that only machines unlawfully transported in interstate commerce may be seized,[2] will mean that the very act of concealment of a machine's movement by failure to report will protect the machines against seizure.

The purpose of the statute, of course, is to keep slot machines out of states in which they are not wanted. This can best be accomplished by seizing

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[2] No one, we assume, will doubt the legality of seizing machines actually so transported. See *Hipolite Egg Co.* v. *United States*, 220 U.S. 45; *McDermott* v. *Wisconsin*, 228 U.S. 115, 136.

the machines themselves. Normally, this will not be possible while the machines are actually in the course of interstate movement; it must be done afterwards, at a time when the machines' identity and movements, otherwise easily concealable, can best be determined from the reports required to be filed. Frustration of this method of identification should not immunize the machines from seizure. It is, therefore, not only reasonable, but indeed essential to effectuation of the statutory policy, that machines the identification of which is prevented by the dealers' failure to comply with Section 3 be forfeited along with machines which can be proved to have been unlawfully transported in interstate. Since it is the dealers' own failure to report which may make it impossible to prove that the machine has been so transported, Congress may reasonably prevent the dealers who violate the law by not registering and reporting from gaining any advantage from their own wrong doing. And this can be accomplished only if all the machines which dealers may be seeking to protect by not reporting are forfeitable. Cf. *United States* v. *Sischo*, 262 U.S. 165.

A concrete example will show the need for this. The trial judge did not doubt that the machines seized had come into Tennessee from the outside. This can be assumed since the libel asserts that they were Mills machines (R. 1), and the congressional hearings showed that the Mills plant is lo-

cated in Chicago.[3] But the trial court said that it did not appear when the machines had moved in interstate commerce, whether before or after passage of the Act.[4] Without a system of reports the Government may find it difficult to tell when the machines came into Tennessee. The unregistered device which had not passed in interstate commerce since the promulgation of the Act would be indistinguishable from one that had.

In short, enforcement of Section 3, as well as of Section 2, would be rendered difficult or impossible by the very fact of the violation of Section 3. But if the dealer had registered, filed monthly inventories and reports of sales, with the machines identified as required by Section 3, and if the dealers' predecessors in title had done the same, the Government would know whether the transportation had occurred after January 2, 1951, or if the machines had been a part of the dealers' stocks at that time. It is thus not unreasonable for Congress to believe that the public cannot be adequately safeguarded against the interstate transportation of slot machines unless the failure to file the reports, as well as the unlawful transportation, makes the machine forfeitable.

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[3] See Hearings before House Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess., on S. 3357 and H. R. 6736, p. 180, and our brief in Nos. 40 and 41, pp. 18–19.

[4] The Act was passed twenty months before the libel was filed and six to ten months before the sales.

3. Cases Sustaining the Use of Forfeitures as a Means of Enforcing Informational Requirements.

There is ample precedent for using the sanction of forfeiture to enforce informational requirements. 26 U.S.C. Sec. 2841(c)(1) and its predecessors have long provided that whenever, with intent to defraud the revenue, a false entry is made or a required entry omitted from a distiller's books, or the distiller omits or refuses to provide such books, or does not produce them when sought by a revenue officer—

> the distillery, distilling apparatus, and the lot or tract of land on which it stands, and all personal property on said premises used in the business there carried on, shall be forfeited to the United States.

The validity of forfeitures under this and similar provisions for failure to keep proper records has been sustained in many cases. *United States* v. *Stowell*, 133 U.S. 1; *Dobbin's Distillery* v. *United States*, 96 U.S. 395; *Thacher's Distilled Spirits*, 103 U.S. 679; *Grain Distillery No. 8* v. *United States*, 204 Fed. 429 (C.A. 4); *United States* v. *Distillery at Petersburg*, Fed. Cas. No. 14,961 (C.C.E.D. Va.) *One 1941 Buick Sedan* v. *United States*, 158 F. 2d 445 (C.A. 10). The customs laws contain similar provisions for the forfeiture of vessels or merchandise where proper manifests have not been filed 19 U.S.C. 1459, 1460, 1497, 1584, 1585. See *General Import Co.* v. *United States*, 286 U.S. 70.

It is to be noted that the business operating a distillery had not been made illegal by Congress; the Federal Government's interest was solely in the collection of taxes. If it is reasonable to enforce the revenue laws by forfeiting all the real and personal property used by the distiller whenever false reports are filed or an agent prevented from examining the books, the same must be true as to the forfeiture of slot machines for failure to register and file reports. In each instance the information sought is needed to enforce a valid statute, and the property in question is not required to have been used illegally.

4. The Fact That the Burden of Forfeiture May Fall Upon Entirely Innocent Persons Will Not Prevent Seizure.

The same cases and others also establish that the fact that the burden of forfeiture may fall upon an innocent person will not prevent seizure. *United States* v. *Stowell*, 133 U.S. 1; *Dobbin's Distillery* v. *United States*, 96 U.S. 395; *Henderson's Distilled Spirits*, 14 Wall. 44; *Thacher's Distilled Spirits*, 103 U.S. 679; *United States* v. *1960 Bags of Coffee*, 8 Cranch 398; *Various Items* v. *United States*, 282 U.S. 577, 581; *United States* v. *One Ford Coupe*, 272 U.S. 321, 332-333; *Goldsmith-Grant Co.* v. *United States*, 254 U.S. 505, 510-512; *United States* v. *Pacific Finance Corp.*, 110 F. 2d 732 (C.A. 2).

The *Stowell* and *Dobbin* cases involved the forfeiture of property leased from the owner by the

distiller who did not furnish the required information. In each case the owner's innocence was held not to bar forfeiture of his property; in the *Dobbin* case the Court stated (96 U.S. at 401), in a passage subsequently quoted with approval in *Various Items* v. *United States*, 282 U.S. at 581:

> Nothing can be plainer in legal decision than the proposition that the offence therein defined is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner, beyond what necessarily arises from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery.
>
> Cases often arise where the property of the owner is forfeited on account of the fraud, neglect, or misconduct of those intrusted with its possession, care, and custody, even when the owner is otherwise without fault * * *

A number of the above authorities establish that this doctrine applies to purchasers in the position of the Greymere Country Club. The *Thacher* case involved seizure from a purchaser of whiskey, whose predecessor in title had filed false documents. The Court stated (103 U.S. 682):

> Though claimant's counsel sets up the innocence of the present claimant in regard to the fraud or any knowledge of it, it can hardly

> be necessary at this day to reconsider, the doctrine that when the act has been done which the law declares to work a forfeiture of the property, the right of the government to seize the property, and assert the forfeiture, attaches at once and may be pursued by the government whenever and in whose hands soever that property may be found. See *Henderson's Distilled Spirits,* 14 Wall. 44.

In the *Henderson* case the seizure, sustained by the Court, was from a bona fide purchaser who had paid the tax, but after the prior owner had removed the whiskey with intent to defraud.

As far back as 1814, the Court held that a sale did not defeat the Government's right to forfeit, saying (*United States* v. *1960 Bags of Coffee,* 8 Cranch at 405):

> It is true, that cases of hardship and even absurdity may be supposed to grow out of this decision, but on the other hand, if by a sale, it is put in the power of an offender to purge a forfeiture, a state of things not less absurd will certainly result from it.

Subsequently in the *Stowell* case, 133 U.S. at 16-17, the Court again noted that bona fide purchasers were not protected against forfeiture:

> By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the

> property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, *even to purchasers in good faith,* [Italics supplied.]

The same principle was recognized more recently in *United States* v. *One Ford Coupe* and the *Goldsmith Grant* case, each of which involved the forfeiture of automobiles used in violation of the liquor laws. In the case first cited, the Court said (272 U.S. at 332):

> The claimant contends that § 26 has modified § 3450, as applied to intoxicating liquors, so as to deny a forfeiture of the interest in the vehicle of one who had no guilty knowledge that it was to be used for an illegal purpose. That there was no such protection of the innocent interest prior to the National Prohibition Act is conceded. *Goldsmith, Jr.-Grant Co.* v. *United States,* 254 U.S. 505. * * * The argument that by § 26 Congress manifested the intention to protect generally innocent interests is unfounded.

These cases are sufficient to meet the contention advanced by the intervenor, Greymere Country Club, that it is improper to seize the machines after they have come into its possession. The machines were forfeited at the time of the sale by the un-

registered dealer. The purchaser could have protected itself before paying for the machines by determining whether the dealer was registered and otherwise in compliance with Section 3 of the statute. A purchaser of slot machines is thus in a much better position to protect himself against losing his property because of the unlawful acts of persons previously in possession than was true of the innocent property owners and purchasers in the cases cited above. And purchasers of devices such as slot machines, which are known to be barred from interstate commerce, are much more clearly on notice to be careful when they buy than are owners or purchasers of such perfectly lawful articles as automobiles, whiskey or coffee.

CONCLUSION

For the reasons stated herein and in the Government's brief in Nos. 40 and 41, the judgment of the court below should be reversed.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

September, 1953

☆U. S. GOVERNMENT PRINTING OFFICE 1953—869993/P.O.302

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

Indictment No. 13393

UNITED STATES OF AMERICA

v.

ROSCOE DENMARK

STATEMENT AS TO JURISDICTION

In compliance with Rule 37(a)(1) of the Federal Rules of Criminal Procedure and Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis on which the Supreme Court has jurisdiction on appeal to review the orders of the District Court in both causes dismissing the indictments.

OPINION BELOW

The order of the District Court has not yet been reported. A copy thereof is annexed hereto as Appendix A. A copy of the amendatory order is annexed hereto as Appendix A-1.

JURISDICTION

The order of the District Court dismissing the indictment was entered on February 25, 1953. An amendment to the order was entered on March 26,

1953. The jurisdiction of the Supreme Court to review on direct appeal the order of the District Court dismissing the indictment, based on a construction and the unconstitutionality of the statute upon which the indictment is founded, is conferred by 18 U.S.C. 3731. See also Rules 37(a)(2) and 45(a) F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether, in aid of its power to prohibit the shipping of gambling machines in interstate commerce, Congress may require dealers in such machines to register with the Attorney General and report all sales, including intrastate deliveries.

2. Whether the requirement that the dealer register with the Attorney General the addresses of his places of business "in such district" renders the statute void for vagueness.

STATEMENT

On May 13, 1952 an indictment in four counts charging violations of Section 3 of the Act of January 2, 1951 (Appendix B, *infra*) was returned against defendant in the District Court for the Southern District of Georgia. Count one charged defendant with engaging in the business of a dealer in gambling devices without having registered with the Attorney General his name, trade name, and addresses of his places of business and the remaining three counts with having failed to file reports of the sales and deliveries of gambling devices, as required by the Statute.

Defendant's motion to dismiss the indictment was granted. In its opinion, as amended, the District Court noted that "no allegation is made in the indictment as to any of the sales being interstate commerce, and the Assistant District Attorney conceded that there were no interstate sales." The Court held that "The statute under consideration does not apply to intrastate transactions even should it be deemed constitutional", and further "that the Statute involved in so far as it undertakes to regulate purely intrastate transactions goes beyond the power of Congress under the commerce clause of the Constitution."

The Court also held that the requirement in Section 3, that a dealer register with the Attorney General his place of business "in such district" rendered the statute "too vague, indefinite and uncertain in failing to definitely and clearly designate what is meant by the language 'In such district'".

THE QUESTION IS SUBSTANTIAL

1. While recognizing the validity of the Act of January 2, 1951, 64 Stat. 1134 (15 U.S.C. 1171-1177, Supp. V) in so far as it bans from shipment into interstate commerce gambling devices destined for states which have not enacted laws exempting themselves from its scope, the decision below seriously hampers its enforcement by holding that the registration and reporting requirements of Section 3 cannot constitutionally be applied to a dealer in gambling devices who does not himself engage in an actual interstate shipment. The decision in the

instant case goes beyond that in *United States* v. *Five Gambling Devices*, No. 558 this Term, presently before the Supreme Court on direct appeal from a decision of the District Court for the Middle District of Tennessee dismissing libels for forfeiture of gambling devices sold by unregistered dealers. There the Court had assumed the validity of the registration provisions, holding merely that Congress had no power to provide for the forfeiture of devices which were not at the time of seizure in the stream of interstate commerce. The instant decision holds the registration and report sections unconstitutional as applied to a dealer who does not himself directly make interstate sales. We submit that the instant decision represents an unduly narrow construction on the Congressional power over interstate commerce, and is contrary to the decisions of this Court.

Congress has the power to ban from interstate commerce articles injurious to public health, morals or welfare, and may aid state law enforcement by prohibiting the use of the channels of interstate commerce to contravene state policy. *United States* v. *Carolene Products Co.*, 304 U.S. 144; *Kentucky Whip and Collar Co.* v. *Illinois Central Railroad Co.*, 299 U.S. 334; *Whitfield* v. *Ohio*, 297 U.S. 431; *Lottery Case*, 188 U.S. 321. And in exercising its delegated power under the commerce clause, Congress regulates "those activities intrastate which so affect interstate commerce or the exertion of the power of Congress over it, as to make regulation of

them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate commerce". *Wickard* v. *Filburn*, 317 U.S. 11, 124. See also *United States* v. *Walsh*, 331 U.S. 432; *United States* v. *Frankfort Distilleries*, 324 U.S. 293; *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110; *United States* v. *Darby*, 312 U.S. 100, 117-118.[1] One such implementing provision is the requirement that all persons engaged in a particular business, register and file reports so that the transactions which might be subject to federal control can be identified. *Interstate Commerce Commission* v. *Goodrich Transit Company*, 224 U.S. 194; *Shapiro* v. *United States*, 335 U.S. 1, 32-33. See also *United States* v. *Kahriger*, No. 169, decided this Term, slip op. p. 9; *Sonzinsky* v. *United States*, 300 U.S. 506-513; *Nigro* v. *United States*, 276 U.S. 332, 350-352; *Arrow Distilleries Inc.* v. *Alexander*, 109 F. 2d. 397 (C.A. 7). The requirements of registration and reporting need not be limited to those dealers who engage in interstate transactions, but may encompass all transactions, knowledge of which might facilitate the administration of the Act. "The requirement for records even of the intrastate transactions is an

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[1] The Supreme Court recently observed in *United States* v. *Kahriger*, No. 167, decided this Term, slip op. p. 7: "* * * Where federal legislation has rested on other congressional powers, such as the Necessary and Proper Clause or the Commerce Clause, this Court has generally sustained the statutes, despite their effect on matters ordinarily considered state concern. Where federal power to regulate is found, its exercise is a matter for Congress * * *."

appropriate means to the legitimate end". *United States* v. *Darby*, 312 U.S. 100, 125.[2]

The legislative history shows that trading in gambling devices was known to be interstate in nature and thus an appropriate subject of federal concern. The manufacture of slot machines is concentrated in the area of Chicago, Illinois, and the machines are distributed throughout the country (S. Rep. 307, 82d Cong., 1st Sess. p. 14). In a report on the bill (H. Rep. No. 2769, 81st Cong., 2d Sess., p. 4) it was stated that those favoring the legislation "pointed, particularly, to the existence of nation-wide crime syndicates which are securing a large share of their revenue from the operation of slot machines and other gambling machines."

In addressing itself to the control of this problem, Congress evidently felt that among manufacturers and dealers in such machines, interstate and intrastate transactions were so commingled (or their nature so obscured) that registration of and reports from all dealers and manufacturers were necessary

[2] The Supreme Court in addressing itself to a contention that a provision of the Interstate Commerce Act which required carriers doing both interstate and intrastate business to render accounts of all of their business was beyond the power of Congress as a regulation of intrastate commerce, said in *Interstate Commerce Commission* v. *Goodrich Transit Company*, *supra* (224 U.S. 194, 211): "* * * The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business."

for any effective regulation of the interstate aspects of the business. The devious processes through which gambling devices get into interstate commerce and through which they are transported to ultimate consignees in distant states are difficult of detection, and their nature as interstate or intrastate commerce can be obscured by straw transactions and intermediate sales, both before and after interstate transit. In order to trace the chain of acts by which a gambling device is transported from its place of origin in Illinois to its ultimate point of destination, each transaction must be identified by a system of registration and reporting, to give effect to the policy of the Act. In addressing itself to analogous legislation banning the shipment of adulterated food in interstate commerce the Supreme Court said in *Hipolite Egg Co.* v. *United States*, 220 U.S. 45, 57, "It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and be stealthily taken out again upon arriving at their destination and be given asylum in the mass of property of the state." Similarly here, if the registration and reporting requirements of Section 3 of the Act were construed narrowly to apply only to actual shipments of gambling devices across state lines, and to exempt all transactions before and after such transit, the intendment of the Act would be rendered nugatory by calculated evasions.

2. The District Court also held that Section 3 "is too vague, indefinite and uncertain in failing to definitely and clearly designate what is meant by

the language 'In such district' ", in that portion requiring registration with the Attorney General of places of business "in such district". The bill as originally introduced in committee (S. 3357, 1st Cong., 2d Sess.) provided in its third section that "* * * every manufacturer of and dealer in gambling devices shall register with the collector of internal revenue for each district in which such business is to be carried on, his name or trade name, the address of his principal place of business, and the addresses of his places of business *in such district*" [italics supplied]. In committee the provision for registration with "the collector of internal revenue for each district" was amended to provide for registration "with the Attorney General", but the phrase "in such district" at the end of the same sentence was not deleted.

The statute clearly requires that each manufacturer and dealer in gambling devices must register with the Attorney General of the United States his name or trade name, the address of his principal place of business, and the address of any of his other places of business. The reference to the "district" doubtless meant that for purposes of administering the Act, reporting districts would be established by the Department of Justice. This has been done by Department of Justice Order No. 4173, 16 F.R. 3509 (1951) (Appendix C, *infra*) promulgated to implement the Act, which creates two reporting districts,—one for manufacturers and dealers in gambling devices having places of business in Illinois, the other for those having places of

business elsewhere. A person subject to the Act would therefore not be in any doubt as to where to file the reports.

It is submitted that the decision of the District Court is erroneous and that the questions presented by this appeal are substantial ones which should be settled by the Supreme Court.

Respectfully submitted,

(S.) ROBERT L. STERN,
Acting Solicitor General.

Dated: March 19, 1953.

APPENDIX "A"

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION

Indictment No. 13393

Vio: Title 15, U.S.C., Sec. 1173

UNITED STATES OF AMERICA

v.

ROSCOE DENMARK

An indictment in four counts was returned against Roscoe Denmark charging violations of Title 15 USC 1173. The first count charges that defendant was a dealer in gambling devices and failed to register with the Attorney General of the United States. The remaining counts of the indictment charge that the defendant sold and delivered gambling devices to the persons named in the respective counts within the Savannah Division of the Southern District of Georgia and did not file inventories and records of the sales with the Attorney General.

By motion to dismiss the indictment timely filed and presented, the defendant contends that Title 15 USC 1173 is unconstitutional as being in violation of the Tenth Amendment to the Constitution in so far as it undertakes to regulate transactions purely local in their nature and entirely intrastate and transactions which do not directly affect interstate commerce. It is further contended by the defendant in his motion to dismiss that Title 15 USC 1173

is too vague, indefinite, and uncertain to be enforceable, particularly with reference to the language "in such district".

As this opinion dealing with the constitutionality of, and application of Title 15 USC 1173 disposes of the case, no discussion is had as to the other grounds of the motion.

The indictment and all counts thereof is based on Title 15 USC 1173, (Act of Congress of January 2, 1951.) Section 1172 of this Act prohibits the transportation of gambling devices in interstate commerce. It was passed pursuant to the constitutional power of Congress to regulate interstate commerce. Being penal in character it must be strictly construed.

That Congress has the power to prohibit and regulate the transportation of gambling devices in interstate commerce is clear, and it may regulate to the extent of affecting such intrastate transactions as directly affect interstate commerce (but to regulate transactions purely intrastate or which only indirectly affect interstate commerce would be exceeding the powers of Congress and would render such action unconstitutional. To come within the powers of Congress to regulate intrastate transactions, such transactions must be such as substantially and directly affect interstate commerce, and to extend the Statute here under consideration to purely intrastate transactions would give to Title 15 Section 1173 of the Act an effect beyond the constitutional powers of Congress. While the following decisions are not binding on me, I think their reasonings are sound.

In the case of United States vs. 5 Gambling De-

vices, Libel for Forfeiture, in the Northern District of Georgia, Judge Sloan, in considering the Statute here involved, ruled: "It is neither shown, or contended that purely intrastate transactions in gambling devices in any way interfere with or obstruct the regulation of such devices in interstate commerce, and to extend the Act to purely intrastate transactions gives to the Act an effect beyond the constitutional power of Congress. The Act does not apply to intrastate transactions."

The Statute under consideration must be valid, if at all, under the Commerce Clause of the Constitution. The power of Congress under this clause is limited to matters directly affecting interstate or foreign commerce. "The power of Congress under the commerce clause is limited to matters directly affecting interstate or foreign commerce, and can not extend to matters the effect of which, whatever its extent, is indirect." James Walter Carter v. Carter Coal Co. et al., 298 U.S. page 238 (21), see page 297.

In the case of United States of America v. 15 Mills Blue Bell Gambling Machines, et al., Libel in Rem, in the Middle District of Georgia, Judge Conger, in considering the Statute here under consideration ruled:

"The fifth defense is predicated on the theory that the Act under which these proceedings are brought seeks to regulate intrastate commerce, which is beyond the power of Congress to do. This defense is sustained," and ruling that the Statute involved was unconstitutional for this reason, and for the further reason that it was too vague, indefinite, and uncertain because of the language "in

such district" contained in the Statute, there being no named or defined district or area to which the words "in such district" could refer.

It is not contended by the counsel for the United States that the defendant was a dealer in interstate commerce, and it is conceded that none of the machines allegedly sold by the defendant were ever transported in interstate commerce and that all of his alleged transactions were had wholly within the State of Georgia. Interstate commerce was not involved and not directly or indirectly affected by the alleged intrastate transactions on the part of the defendant. The Statute under consideration does not apply to intrastate transactions even should it be deemed constitutional.

It seems clear to the Court that the Statute involved in so far as it undertakes to regulate purely intrastate transactions goes beyond the power of Congress under the commerce clause of the Constitution.

The Court is also of the opinion that the Statute is too vague, indefinite, and uncertain in failing to definitely and clearly designate what is meant by the language "In such district", and being a criminal statute it must be strictly construed.

In accordance with the foregoing opinion, it is

CONSIDERED, ORDERED AND ADJUDGED BY THE COURT that the motion of the defendant to dismiss the indictment and all counts thereof be, and the same hereby is, sustained and the indictment and all counts thereof is hereby dismissed.

This the 24 day of February, 1953.

(S.) F. M. SCARLETT,
United States District Judge.

Endorsement: Criminal Indictment No. 13393. Opinion and Order of Court Dismissing Indictment. Filed in Clerk's Office: February 25, 1953. Eugene F. Edwards, Deputy Clerk.

APPENDIX "A-1"

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION

No. 13393

Vio: Title 15, U.S.C., Sec. 1173

UNITED STATES OF AMERICA

v.

ROSCOE DENMARK

Whereas, this Court on the 25th day of February, 1953, entered judgment in the above-entitled cause sustaining the defendant's motion to dismiss the indictment and dismissing said indictment; and

Whereas, said judgment recites in the first part of the second paragraph on page three thereof, the following, to-wit:

"It is not contended by the counsel for the United States that the defendant was a dealer in interstate commerce, and it is conceded that none of the machines allegedly sold by the defendant were ever transported in interstate commerce and that all of his alleged transactions were had wholly within the State of Georgia."

It being made to appear to the Court that the wording quoted is an incorrect statement as to what transpired, and counsel for the defendant agreeing,

IT IS THE ORDER AND JUDGMENT OF THE COURT that the judgment heretofore entered in said cause be, and the same is, hereby modified by deleting therefrom the above-quoted words; and that the following words be inserted in lieu thereof as a part of said judgment, to-wit:

"No allegation is made in the indictment as to any of the sales being interstate commerce, and the Assistant District Attorney conceded that there were no interstate sales."

Let this order be filed of record.

This 26th day of March, 1953.

(S.) F. M. SCARLETT,
United States Judge.

Endorsement: Criminal Indictment No. 13393 Order Amending Judgment and Opinion of Court. Filed in Clerk's Office: March 26th, 1953. Eugene F. Edwards, Deputy Clerk.

APPENDIX "B"

The Act of January 2, 1951, 64 Stat. 1134 (15 U.S.C. 1171-1177, Supp. V), provides in pertinent part as follows:

That as used in this Act—

(a) The term "gambling device" means—

(1) any so-called "slot machine" or any other machine or mechanical device an essen-

tial part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated, it may deliver, as the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device.

* * * * *

SEC. 2. It shall be unlawful knowingly to transport any gambling device to any place outside of such State, the District of Columbia, or possession; Provided, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section.

* * * * *

Sec. 3. Upon first engaging in business, and thereafter on or before the 1st day of July of each year, every manufacturer of and dealer in gambling devices shall register with the Attorney General his name or trade name, the address of his principal place of business, and the addresses of his places of business in such district. On or before the last day of each month every manufacturer of and dealer in gambling devices shall file with the Attorney General an inventory and record of all sales and deliveries of gambling devices as of the close of the preceding calendar month for the place or places of business in the district. The monthly record of sales and deliveries of such gambling devices shall show the mark and number identifying each article together with the name and address of the buyer or consignee thereof and the name and address of the carrier. Duplicate bills or invoices, if complete in the foregoing respects, may be used in filing the record of sales and deliveries. For the purposes of this Act, every manufacturer or dealer shall mark and number each gambling device so that it is individually identifiable. In cases of sale, delivery, or shipment of gambling devices in unassembled form, the manufacturer or dealer shall separately mark and number the components of each gambling device with a common mark and number as if it were the assembled gambling device. It shall be unlawful for any manufacturer or dealer to sell, deliver, or ship any gambling device which is not marked and numbered for identification as herein pro-

vided; and it shall be unlawful for any manufacturer or dealer to manufacture, recondition, repair, sell, deliver, or ship any gambling device without having registered as required by this section, or without filing monthly the required inventories and records of sales and deliveries.

* * * * *

Sec. 5. It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in Section 1151 of title 18 of the United States Code or within the special maritime and territorial jurisdiction of the United States as defined in Section 7 of title 18 of the United States Code.

* * * * *

Sec. 6. Whoever violates any of the provisions of sections 2, 3, 4 or 5 of this Act shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Sec. 7. Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed or used in violation of the provisions of this Act shall be seized and forfeited to the United States. All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the pro-

ceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred under the provisions of this Act, insofar as applicable and not inconsistent with the provisions hereof: *Provided*, That such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of gambling devices under this Act by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

* * * * * *

APPENDIX "C"

The regulations promulgated pursuant to 5 U. S. C. 22 by the Attorney General of the United States to implement the Act of January 2, 1951 are as follows (16 F.R. 3509, 28 C.F.R. 3):

The following regulations are hereby prescribed for carrying out certain provisions of the act of January 2, 1951, entitled "An Act to prohibit transportation of gambling devices in interstate and foreign commerce" (Public Law 906, 81st Congress)

Sec. 3.1 *Registration and filing of reports by*

manufacturers of and dealers in gambling devices having places of business in Illinois. Manufacturers of and dealers in gambling devices having places of business in the State of Illinois shall (a) register as required by Section 3 of the act of January 2, 1951, entitled "An Act to prohibit transportation of gambling devices in interstate and foreign commerce" (Public Law 906, 81st Congress) with the Attorney General at the office of the United States Attorney, 219 South Clark Street, Chicago, Illinois, and (b) file the monthly reports required by that section with the Attorney General at the same place.

Sec. 3.2 *Registration and filing of reports by manufacturers of and dealers in gambling devices having places of business in States other than Illinois.* Manufacturers of and dealers in gambling devices having places of business in States other than the State of Illinois shall (a) register as required by section 3 of the said act of January 2, 1951, with the Attorney General at the Department of Justice Building, Washington, D. C., and (b) file the monthly reports required by that section with the Attorney General at the same place. The term "States" as used in this section includes Alaska, Hawaii, Puerto Rico, the Virgin Islands, and Guam.

Sec. 3.3 *Seizures.* The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors and agents of the Federal Bureau of Investigation of the Department of Justice are hereby authorized and designated to make seizures of gambling devices under the said act of January 2, 1951.

Sec. 3.4 *Custody and Forfeiture.* All gambling devices seized pursuant to section 3.3 of this order shall be held for, or turned over to, the United States marshal for the district in which the seizure is made. Other than the authority granted in section 3.3 of this order, United States marshals are hereby authorized and designated as the officers to perform the various duties with respect to seizures and forfeitures of gambling devices under the said act of January 2, 1951, as are imposed upon collectors of customs or any other persons with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws.

The Attorney General will perform, with respect to the seizure and forfeiture of gambling devices under the said act of January 2, 1951, the functions and duties now performed by the Secretary of the Treasury in regard to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws.

This order shall become effective on the date of its publication in the Federal Register. The regulations prescribed by the order are necessary for carrying out certain provisions of the act of January 2, 1951, entitled "An Act to prohibit transportation of gambling devices in interstate and foreign commerce" (Public Law 906, 81st Congress), which became effective upon the date of its approval. Compliance with the provisions of section 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1003) with respect to notice of proposed rule making and delayed effective date is impracticable and contrary to the public interest in

this instance because such compliance would unduly delay and impede the administration and enforcement of the said act.

(R.S. 161; secs. 3 and 7, Pub. Law 906, 81st Cong.)

(S.) J. HOWARD MCGRATH,
Attorney General.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 40

UNITED STATES OF AMERICA, APPELLANT

v.

ROSCOE DENMARK

No. 41

UNITED STATES OF AMERICA, APPELLANT

v.

MILTON M. BRAUN

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court and the amendment thereto in No. 40 (*Denmark* R. 5-8), and the opinion in No. 41 (*Braun* R. 4-5), are not reported.

JURISDICTION

The order of the District Court dismissing the indictment in No. 40 was entered on February 25, 1953 (R. 5-7), and in No. 41, on February 26, 1953 (R. 4-5). An amendment to the order in No. 40 was entered on March 26, 1953 (R. 7-8). Notices of appeal in both cases were filed on March 26, 1953 (*Denmark* R. 8; *Braun* R. 6). On May 18, 1953, this Court noted probable jurisdiction in both cases and consolidated them for argument (*Denmark* R. 10; *Braun* R. 7). The jurisdiction of the Supreme Court to review on direct appeal the orders of the District Court dismissing the indictment in each case, based on a construction and the unconstitutionality of the statute upon which the indictment is founded, is conferred by 18 U.S.C. 3731. See also Rules 37(a)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether, in aid of its power to prohibit the shipping of gambling machines in interstate commerce, Congress may require dealers in such machines to register with the Attorney General and report all sales, including intrastate deliveries.

2. Whether the requirement that the dealer register with the Attorney General the addresses of his places of business "in such district" renders the statute void for vagueness.

STATUTE AND REGULATION INVOLVED

The statute and regulation involved are set forth as Appendix A (*infra*, pp. 27-30) and Appendix B (*infra* p. 33), respectively.

STATEMENT

No. 40.

On May 13, 1952, an indictment in four counts charging violations of Section 3 of the Act of January 2, 1951 (pp. 28-29, *infra*) was returned against appellee Denmark in the United States District Court for the Southern District of Georgia (*Denmark* R. 1-2).

Count One of the indictment charges appellee with engaging in the business of a dealer in gambling devices without having registered with the Attorney General his name, trade name, and addresses of his places of business. The other three counts charge appellee, a dealer in gambling devices, with having failed to file reports of certain sales and deliveries of gambling devices as required by statute.

Appellee's motion to dismiss the indictment (*Denmark* R. 3-4) was granted. In its opinion as amended (*Denmark* R. 5-8), the District Court indicated as the basis of its order the fact that Section 3 of the Act of January 2, 1951 is constitutionally applicable only to "interstate sales." As there was no allegation that the transactions alleged in counts 2, 3, and 4 were "interstate sales," and the government attorney conceded they were not, the indictment was held fatally defective.[1]

[1] The trial court at first erroneously stated in its opinion and order dismissing the indictment (*Denmark* R. 6) that "* * * it is conceded that none of the machines allegedly sold by the defendant were ever transported in interstate commerce and that all of his alleged transactions were had wholly within the State of Georgia." On application by the Government, and

The District Court also held that the requirement in Section 3, that a dealer register with the Attorney General his place of business "in such district" rendered the statute "too vague, indefinite, and uncertain in failing to definitely and clearly designate what is meant by the language 'In such district.'"

No. 41

On May 13, 1952, in the United States District Court for the Southern District of Georgia, a five-count indictment was returned against the appellee Braun (*Braun* R. 1-2), the first count of which charged him with engaging in the business of a dealer in gambling devices without having registered with the Attorney General of the United States his name, trade name, and address of his place of business. The remaining four counts charged him with having failed to file with the Attorney General an inventory and record of various sales and deliveries of gambling devices, all as required by Section 3 of the Act of January 2, 1951 (*infra*, pp. 28-29).

Appellee filed a motion to dismiss the indictment (*Braun* R. 3) which was granted. In its opinion

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with consent of defense counsel, this part of the opinion was corrected and amended to read (*Denmark* R. 8): "No allegation is made in the indictment as to any of the sales being interstate commerce, and the Assistant District Attorney conceded that there were no interstate sales."

The Government submits that the concession in this case and in the companion *Braun* case, was intended to mean only that none of the sales alleged in the reporting counts of the indictments were sales directly across a state line. The concession was not intended to mean that the machines had not been or would not be transported in interstate commerce.

dismissing the indictment (*Brown* R. 4-5), the District Court noted that "No allegation is made in the indictment as to any of the sales being interstate commerce, and the Assistant District Attorney conceded that there were no interstate sales." The court held, as it had previously in the companion *Denmark* case, that "Section 1173 has no application to the defendant in this case, since the Statute under consideration does not apply to intrastate transactions which do not directly affect interstate commerce," and further that "the statute involved, in so far as it undertakes to regulate purely intra-state transactions which do not directly affect interstate commerce, goes beyond the power of Congress under the Commerce Clause of the Constitution."

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding that Congress cannot, in aid of its power to prohibit the shipping of gambling machines in interstate commerce, require dealers in such machines to register with the Attorney General and report all sales, including intrastate deliveries, pursuant to Section 3, Act of January 2, 1951, 64 Stat. 1135, 15 U.S.C. (Supp. V) 1173.

2. In holding that the requirement that the dealer register with the Attorney General the addresses of his places of business "in such district" renders the statute void for vagueness.

3. In dismissing the indictments in each case.

SUMMARY OF ARGUMENT

I

Many decisions establish that Congress may choose any reasonable means for carrying into execution the powers vested in it, and that pursuant to this principle, Congress may reach intrastate activities when necessary to the effective enforcement of a regulation of interstate commerce. It is also well established that this power is not limited to persons who are themselves in some way engaged in such commerce. *E.g., United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 121; *United States* v. *Sullivan*, 332 U.S. 689; *Wickard* v. *Filburn*, 317 U.S. 111.

Here Congress is not regulating any intrastate activities; it is only requiring the furnishing of information needed in order that slot machines unlawfully transported in interstate commerce may be identified. In a business which Congress found to be closely enmeshed with nation-wide crime syndicates, concealment of prohibited interstate shipments through straw transactions and intermediaries is to be anticipated. A system of reports which will enable the Government to follow a slot machine as it moves from hand to hand before and after, as well as during interstate transportation, is certainly a reasonable and probably an essential means of determining both the identity of the illegal transporter and the whereabouts of the machine which has been so transported. Other informational requirements as to intrastate activi-

ties have uniformly been sustained. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U.S. 194, 215; *United States* v. *Darby*, 312 U.S. 100, 124; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 214. These authorities and principles are plainly sufficient to demonstrate the constitutionality of Section 3 of the slot machine statute as applied to intrastate dealers.

II

The statute is not indefinite and uncertain in failing to define the districts with respect to which the manufacturers and dealers must file reports. The Attorney General has by appropriately published regulation defined such district so that no person subject to the Act would be in any doubt as to where he should file reports or as to the places to be reported. The statute should be given a sensible meaning which will carry out the congressional purpose so long as no trap for the unwary is created.

ARGUMENT

I

The Informational Requirements of the Act Forbidding the Interstate Transportation of Slot Machines Are Constitutional Even as Applied to Intrastate Transactions.

Section 2 of the Act of January 2, 1951, 64 Stat. 1134, 15 U.S.C. (Supp. V) 1172, prohibits the transportation of gambling devices, *i.e.*, slot machines, in interstate commerce, except to states or portions of states which by state law are ex-

empted from the prohibition. Section 3 (15 U.S.C. (Supp. V) 1173) requires every manufacturer of and dealer in such devices annually to register with the Attorney General his name and the addresses of his places of business, and monthly to file with the Attorney General an inventory and a record identifying by mark and by number each device sold and delivered during the preceding month, together with the names and addresses of the buyers or consignees and of the carriers.[2] These reporting provisions are not limited to persons or transactions in interstate commerce, although their obvious purpose is to obtain the information needed in order to enforce the prohibitions on interstate shipments contained in Section 2. The district court, though recognizing the power of Congress to forbid the interstate transportation of gambling devices, has held that Section 3 constitutes a regulation of purely intrastate transactions not directly affecting interstate commerce, and that insofar as the statute was so applied it went beyond the commerce power of Congress.

This decision overlooks the fact that Section 3 requires merely the furnishing of information, and that such information can reasonably be sought in order to facilitate, or indeed permit, the enforcement of the interstate prohibition contained in Section 2. The decision is thus in conflict with principles frequently recognized and applied by this Court.

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[2] Violations of the Act, including Section 3, are punished by fine and imprisonment. Section 6, 15 U.S.C. (Supp. V) 1176.

A. THE COMMERCE POWER PERMITS CONGRESS TO CHOOSE MEANS REASONABLY ADAPTED TO INSURING THE ENFORCEMENT OF THE PROHIBITION ON THE INTERSTATE TRANSPORTATION OF SLOT MACHINES, AND THIS INCLUDES REGULATIONS AFFECTING INTRASTATE ACTIVITIES TO WHATEVER EXTENT IS NECESSARY.

The Constitution not only empowers Congress "To regulate Commerce * * * among the several States" (Art. I, Sec. 8, Cl. 3) but also "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Power" (Art. I, Sec. 8, Cl. 17). It has been axiomatic since *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, that the "sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people."

Many decisions of this Court have established that this principle applies to the power of Congress to reach intrastate activities as a means of effectuating a regulation of interstate commerce. This Court has thrice stated in recent years, in identical terms, that the commerce power "extends to those activities intrastate which so affect interstate commerce *or the exercise of the power of Congress over it* as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." (Italics supplied.) *United States* v. *Darby*, 312 U.S. 100, 118; *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119; *Wickard* v. *Filburn*, 317 U.S. 111, 124.

And in the *Darby* case the Court declared that "Congress, having by the present Act adopted the policy of excluding from interstate commerce [goods produced without conforming to the specified labor standards, for which we can substitute "gambling devices"], it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government." 312 U.S. at 121. In support of this proposition, the Court referred to the familiar cases holding "that the power to prohibit traffic in intoxicating liquors includes, as an appropriate means of making that prohibition effective, power to prohibit traffic in similar liquors, although non-intoxicating" (*Everard's Breweries* v. *Day*, 265 U.S. 545, 560; *Purity Extract Co.* v. *Lynch*, 226 U.S. 192; *Jacob Ruppert* v. *Caffey*, 251 U.S. 264) as well as to *Westfall* v. *United States*, 274 U.S. 256, 259, in which the Court states that "when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so."

In the *Darby* case itself this principle was applied to sustain the prohibition of substandard labor conditions in the production of goods some

of which were destined for interstate commerce, on the ground that such a prohibition, applicable to intrastate transactions, was an effective means of enforcing the prohibition against the interstate transportation of such goods. 312 U.S. at 121-122. We shall show at Point B, *infra*, pp. 14-23, that requiring reports which will permit identification of slot machines whenever they are sold, and of their buyers, will clearly be an effective means of enforcing the prohibition against their interstate transportation.

Other illustrations of the same principle are the familiar commingling cases, in which a federal statute is applied to intrastate as well as interstate acts because enforcement would be impossible if they were required to be separated. *E.g., Currin* v. *Wallace*, 306 U.S. 1; *Mulford* v. *Smith*, 307 U.S. 38. And *United States* v. *Walsh*, 331 U.S. 432 (guaranty that drugs are not misbranded), and *United States* v. *Sullivan*, 332 U.S. 689 (sale of misbranded drugs at retail after interstate shipment to wholesaler) are other recent examples of the regulation of intrastate activities in order to make possible effective enforcement of the regulation of interstate commerce.

These cases and others also show that this principle permits the regulation of an intrastate business even though the person regulated is not himself in interstate commerce at all. Such was the situation in the *Walsh*, *Sullivan* and *Wrightwood* cases, as well as in *Wickard* v. *Filburn* (wheat farmer consuming wheat on his own farm).

In the *Wrightwood* case the Court said on that very point (315 U.S. at 121):

> It is no answer to suggest, as does respondent, that the federal power to regulate intrastate transactions is limited to those who are engaged also in interstate commerce. The injury, and hence the power, does not depend upon the fortuitous circumstance that the particular person conducting the intrastate activities is, or is not, also engaged in interstate commerce. See *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1; *Stevens Co.* v. *Foster & Kleiser Co., supra.* It is the effect upon interstate commerce or *upon the exercise of the power to regulate it*, not the source of the injury which is the criterion of Congressional power. [Italics supplied.]

The authorities referred to, and the principle of constitutional law for which they stand make it plain that Congress can impose affirmative regulation upon persons not engaged in interstate commerce when reasonably appropriate to the effective regulation of such commerce. In the statute now before the Court, Congress has not gone that far. It has not affirmatively regulated the business of intrastate dealers in slot machines. It has merely required them to furnish information, information which is necessary if the prohibition against interstate transportation is to be made effective.

Many cases establish that Congress may require persons to furnish information as to intrastate activities as a means of implementing and enforcing

a statute relating to interstate commerce. Thus in *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U.S. 194, the Court sustained the authority of the Interstate Commerce Commission to require financial reports as to all the intrastate activities of carriers, even including the operation of amusement parks (pp. 215-216). As to this the Court said that "if the Commission is to be informed of the business of the corporation, so far as its bookkeeping and reports are concerned, it must have full knowledge and full disclosures thereof, in order that it may ascertain whether forbidden practices and discriminations are concealed, even unintentionally." The same is true here if the slot machine business is viewed as a whole, as it properly may be by Congress.

In the *Goodrich* case, the Court distinguished between regulation and the furnishing of information, stating that "the requiring of information concerning a business is not regulation of that business." (224 U.S. at 211). The opinion rests on the premise that Congress can seek information as to matters beyond its regulatory power. And *United States* v. *Darby, supra,* disposed summarily of an objection to a record-keeping requirement "incidental" (312 U.S. at 124) to the enforcement of the substantive statutory provision, saying merely that (312 U.S. at 125):

> The requirement for records even of the intrastate transaction is an appropriate means to the legitimate end. See *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n*, 221 U.S.

612; *Interstate Commerce Comm'n* v. *Goodrich Transit Co.*, 224 U.S. 194; *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1, 42.

That information as to intrastate matters may be obtained in enforcing a regulation of interstate commerce also appears from *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, which upheld the power of the Wage and Hour Administrator to subpoena records of employers without first proving that they were covered by the Fair Labor Standards Act. The power to obtain such information, which might in the particular case relate only to intrastate transactions, was necessary to the determination of what acts were not interstate commerce. The authority of Congress to do this, the Court stated, "would seem clearly to be comprehended in the 'necessary and proper' clause, as incidental to both its [Congress'] general legislative and its investigative powers." 327 U.S. at 214. The informational requirements of the slot machine statute have the same purpose—identification of the persons who transport slot machines in interstate commerce and of the machines themselves.

B. THE INFORMATIONAL REQUIREMENTS ARE REASONABLE MEANS OF ENFORCING THE PROHIBITION AGAINST INTERSTATE TRANSPORTATION OF SLOT MACHINES.

Perhaps the most familiar means of implementing regulatory statutes to facilitate their enforcement is by requiring that records be kept or that information be filed with the Government. Such requirements have often been held to be reasonable

and appropriate, and therefore constitutional, means of carrying out substantive powers. See the *Darby* and *Goodrich Transit* cases discussed above and *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission*, 221 U.S. 612; *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1, 42; *United States* v. *Kahriger*, 345 U.S. 22; *Sonzinsky* v. *United States*, 300 U.S. 506; *United States* v. *Doremus*, 249 U.S. 86; *Nigro* v. *United States*, 276 U.S. 332.

The registration and reporting requirements of Section 3 are obviously reasonable means of enforcing the prohibition against the interstate transportation of slot machines, even as applied to dealers who do not themselves sell or transport the machines in interstate commerce. The machines may have been shipped interstate before they reached such a dealer, or they may be so transported after he disposes of them. The statute is enforceable against the person who transports them interstate as well as against the machines themselves. Section 7, 15 U.S.C. (Supp. V) Sec. 1177. If each manufacturer and dealer in the machines reports each transaction of sale, with the identity of the machine, the buyer and the carrier, it will be relatively easy to determine who has transported the machine interstate, and if the machine has been transported into a state where its use is illegal.

A report identifying the machine from a dealer who has received the machine from outside the state, directly or indirectly, can be compared with the report as to the same machine from the state of manufacture and original sale. If all who deal

in the machines without violating the federal statute file reports, the illegal transporter will be easily identified. Thus, if M, the manufacturer, sells to dealer A in the same state who resells to B in the same state, who resells and ships to C in another state, reports by M, A and C will point to B as the illegal transporter, although M, A or C will not have engaged in interstate transportation or perhaps in any interstate commerce at all.

Similarly, even though a dealer such as the defendants in these cases may sell the machines intrastate, the machines eventually may end up across a state line. For example, these defendants, according to the indictment, made unreported sales to buyers in Savannah, Georgia. It would not be difficult for these buyers in turn to resell the machines across the Savannah River into South Carolina. If a machine found in South Carolina, or any other state but Georgia, could be identified as a machine reported as sold by the defendants in Georgia, the Government's records would point to the buyer from the defendants as the illegal interstate transporter, and if this buyer had not himself transported the machines across state lines, his report in turn would identify the next buyer in the chain. Even if the buyer from the defendants filed no report, the enforcing authority would know that he could be questioned as to the identity of the next buyer.

The series of reports from all dealers handling the machines would, if complete, identify the illegal interstate transporter, who presumably would not

himself file reports, as well as the machines illegally transported. And this would be true even though none of those who registered and filed reports were themselves engaged in interstate commerce in violation of the federal law.

Perhaps such an elaborate system of reporting by all dealers would not be necessary if the business were one in which accurate records were invariably kept, and the normal chain from manufacturer to wholesaler to retailer were easily identifiable. But we are not here concerned with an ordinary business. Both the House Committee report on this legislation (H. Rep. 2769, 81st Cong., 2d Sess.) and the report of the Senate Committee to Investigate Organized Crime [3] have emphasized the relation between slot machines and "the existence of Nation-wide crime syndicates which are securing a large share of their revenue from the operation of slot machines and other gambling machines". H. Rep. 2769, *supra*, pp. 4-5. The House Committee stated that (*id.*, pp. 5-6):

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[3] The Third Interim Report of the Special Committee to Investigate Organized Crime in Interstate Commerce of the Senate made the following observation relating to its investigation of Chicago Crime the following year (S. Rep. 307, 82d Cong., 1st Sess., p. 55):

> Most of the coin machines in use throughout the country are manufactured in and around Chicago, and a large number of the machines have been purchased and operated inside the State of Illinois. The manufacture and distribution of slot machines has been a lucrative field of operation for a number of Capone mobsters. The Taylor Manufacturing Co. in Cicero, one of the largest manufacturers of gaming equipment in the country, is partially owned by Claude Maddox, a Capone mobster with a long criminal record, and Joseph Aiuppa, a close friend of Accardo and one of the leading members of the Capone syndicate.

Your committee has favorably reported this bill on the basis primarily of two considerations:

(1) as testified before your committee, Nation-wide syndicates appear to derive substantial revenues from the operation of slot machines and similar gambling devices, and appear to put these revenues into other illegal enterprises with the resulting increase in crimes committed and corruption of public officials, all of which endanger our society; and

(2) slot machines and similar gambling devices appear to offer an opportunity for a particularly vicious form of gambling which "does not give the sucker (many of whom incidentally are juveniles) a decent break."

Representative Preston, who introduced companion bills to S. 3357, which became the Act of January 2, 1951, and who appeared as the first witness in the House hearings, testified that the 10 large concerns which manufacture these devices—including most of the manufacturers of the machines named in these indictments[4]—are all located in Chicago, Illinois, and the machines are distributed from there to places throughout the country (Hearings before the Committee on Interstate and Foreign Commerce, 81st Cong., 2d sess., on S. 3357 and H. R. 6736, pp. 10-12, 23, 28, 29). He also

[4] Compare the indictments (R. 1-2 of each record) with the list of members of the American Coin Machine Manufacturers Association, who produce these devices (Hearings before the Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess., on S. 3357 and H.R. 6736, p. 180).

testified that the syndicates which control the industry are centered in Chicago, operate from coast to coast, and according to surveys made by the California Crime Study Commission and the Chicago Crime Commission make a net profit of two or three billion dollars annually, a large part of which is used to pay off public officials, and in other forms of syndicated crime (*ibid.*, pp. 11-12). He stated during House debate that despite the general state policy of prohibiting their use, state enforcement has broken down due to the policies of local bribery and official graft (96 Cong. Rec. 13638). Although slot machines are illegal in 43 states, and their use is limited in the rest except for Nevada (Hearings, pp. 10-11; 96 Cong. Rec. 13638), the president of the manufacturers association, the American Coin Machine Manufacturers Association, testified to the House Committee that his own company, and the other large Chicago manufacturers, have distributors who deal in coin machines in every state in the union without regard to state illegality (Hearings, pp. 182, 185, 191-192). He stated that 75 to 80% of the business of his company, the Lion Manufacturing Corporation, one of the largest of such companies, was interstate. It dealt through 50 wholesale distributors all over the country, who were privileged to sell to anyone whom they wished. Hearings, pp. 181-183. The other manufacturers operated similarly, he stated. Hearings, p. 183.

In a business of this sort, tied in with the underworld, stringent methods of enforcement are obviously reasonable and necessary. Unless all sales

are reported, it would be easy for those who deal in the machines through straw transactions and various intermediate and perhaps fictitious intrastate sales effectively to conceal the identity of the interstate transporter. Without full information as to the movement of the machines, it would also be difficult to tell which transactions contemplated interstate shipments to states or federal reservations where such devices were illegal, and which were intrastate movements or consignments to excepted states such as Nevada.

The criminal syndicates which are engaged in the slot machine business throughout the country can be expected to utilize every possible clandestine device to avoid the breaking of the interstate transmission line upon which their lucrative enterprises depend. Concealment of the actual illegal interstate shipment through the manipulation of labels and bills of lading could reasonably be anticipated.

For these reasons it is obvious that to administer the Act properly the federal government must be informed as to all transactions in order to detect those that are subject to the direct prohibition. It would have to be informed as to each link in the chain that begins with the Illinois manufacturer (who may or may not sell in interstate commerce), passing through various transactions until the devices are finally sold to the ultimate user. The federal government would then have the benefit of the information supplied by manufacturers and dealers regardless of whether they were acting legally or illegally. It could trace and identify (aided by the

identification provisions of Section 4 of the Act, *infra*, p. 29) the total commerce in gambling devices to the end that interstate transactions could be detected.[5] The provisions of Section 3 are thus a necessary and proper adjunct to Section 2 of the Act. They seek to bring to light for purposes of intelligent administration the whole sequence of transactions in order that the prohibited interstate phases may be identified.

If, on the other hand, as the opinions below seem to suggest, Section 3 was held to be applicable only to those who do the very thing that Section 2 of the Act forbids (*i.e.*, transporting gambling devices to states where they are illegal under state law), its effectiveness would be severely diminished. If only sales directly across state lines were required to be reported under Section 3, dealers could sell to ultimate users in the state of manufacture and the Government would be effectively deprived of any trace of the transaction. The only way Section 3 could possibly be interpreted so as to have any force and effect in the administration of the Act as a whole is to require all dealers and manufacturers to report, whether they are directly involved in shipping such devices across state lines or not.[6]

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[5] It is noteworthy that Section 4 of the Act, *infra*, p. 29, which requires all gambling devices and all packages containing them to "be plainly and clearly labeled or marked so that the name and address of the shipper and of the consignee, and the nature of the article or the contents of the package may be readily ascertained * * *" is not restricted in its language to actual interstate shipments.

[6] That Section 3 would all but be rendered nugatory if limited only to violators of Section 2, is emphasized by experience in enforcing the license tax (26 U.S.C. 3267) against owners of

The interstate nature of the traffic in gambling devices justifies the reasonable implementing requirement that all persons engaged in its operation supply information broad enough to enable the federal government to exercise the limited control measures which the Act seeks to promote.

That such a reasonable means of enforcing a regulation of interstate commerce is constitutional, even though it reaches persons not themselves in such commerce, is demonstrated by the authorities discussed in part A, pp. 9-14, *supra*. We add only a specific reference to a case which dealt with a similar problem. In *Kentucky Whip & Collar Co.* v. *Illinois Central Railroad Co.*, 299 U. S. 334, the statute forbade the shipment of prison made goods into states in which the sale of such goods would be illegal. The labeling provision of the statute required labels disclosing the nature of the goods and the names of the shippers and consignees irrespective of whether the shipment was for such a state or to one in which the use of the goods might be liable. The Court stated, in upholding this provision (at p. 353):

> The fact that the labeling was required in all shipments of convict-made goods, regardless of the law of the State of destination, does not invalidate the provision, as its scope could reasonably be deemed to be necessary to accomplish the legitimate purpose of the Act.

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such devices. Although such tax was paid for the year 1949 on 69,000 machines, the House Report on the bill which became the Act of January 2, 1951 (H. Rep. No. 2769, p. 6, *supra*) estimated that there were probably twice that number in operation.

Otis v. *Parker*, 187 U. S. 606, 609; *New York ex rel. Silz* v. *Hesterberg*, 211 U. S. 31, 40; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201; *Everard's Breweries* v. *Day*, 265 U. S. 545, 560.

II

The District Court Erred in the Denmark Case in Holding Section 3 of the Act Void for Vagueness

The first and second sentences of Section 3 provide:

> Upon first engaging in business, and thereafter on or before the 1st day of July of each year, every manufacturer of and dealer in gambling devices shall register with the Attorney General his name or trade name, the address of his principal place of business, and the addresses of his places of business in such district. On or before the last day of each month every manufacturer of and dealer in gambling devices shall file with the Attorney General an inventory and record of all sales and deliveries of gambling devices as of the close of the preceding calendar month for the place or places of business in the district.

In No. 40, the District Court held that Section 3 "is too vague, indefinite, and uncertain in failing to definitely and clearly designate what is meant by the language 'In such district,'" in that portion requiring registration with the Attorney General of places of business "in such district" (*Denmark* (R. 7)[1]

[1] The bill as originally introduced in committee (S. 3357, 81st Cong., 2d Sess.) provided in its third section that "• • •

The statute clearly requires that each manufacturer and dealer in gambling devices must register with the Attorney General of the United States his name or trade name, the address of his principal place of business, and the address of any of his other places of business. The reference to the "district" should be given a sensible meaning, which will preserve a workable statute and also be intelligible to the persons regulated. The phrase in question can be given such an interpretation if construed as meaning that for purposes of administering the Act, reporting districts would be established by the Department of Justice. This has been done by Department of Justice Order No. 4173, 16 F.R. 3509, 28 C.F.R. (1952 Supp.) 3 Appendix B, *infra*) promulgated to implement the Act, which creates two reporting districts—one for manufacturers and dealers in gambling devices having places of business in Illinois, the other for those having places of business elsewhere. A person subject to the Act would therefore not be in any

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every manufacturer of and dealer in gambling devices shall register with the collector of internal revenue for each district in which such business is to be carried on, his name or trade name, the address of his principal place of business, and the address of his places of business *in such district*" [italics supplied]. In committee the provision for registration with "the collector of internal revenue for each district" was amended to provide for registration "with the Attorney General", but the phrase "in such district" at the end of the same sentence was not deleted. The Acting Secretary of the Treasury recommended this amendment on the theory that (H. Rep. No. 2769, p. 14, *supra*) "It would seem more desirable that those duties of gathering information be vested in the agency which is also charged with responsibility for enforcement of the proposed legislation." See also: *Ibid.* pp. 8-9.

doubt as to where to file the reports or as to the places to be reported. If he has doubts, he is on notice from the Act itself to inquire of the Attorney General as to the boundaries of the reporting districts, or to file the information directly with the Attorney General as to all places of business. The latter procedure would, of course, satisfy the statute.

There is no language in Section 3 which presents any alternative courses of action, or which creates a situation in which the manufacturer or dealer would not know precisely what to do. The fact that statutory language is not composed entirely of self-defining terms, certainly does not invoke the extreme measure of nullifying it under the "void for vagueness doctrine," *United States* v. *Signore*, 115 F. 2d 669, 671 (C.A. 7); *United States* v. *Tishman*, 99 F. 2d 951 (C.A. 7), certiorari denied, 306 U. S. 636. That doctrine is invoked only in instances where patently ambiguous language is so unclear and equivocal as to render its enforcement a denial of due process of law. Cf. *United States* v. *Cardiff*, 344 U. S. 174; *United States* v. *Spector*, 343 U. S. 169, 171-172; *United States* v. *Petrillo*, 332 U. S. 1, 5-7. Plainly no such trap for the unwary exists in the instant language. The duty to report is clear, and whatever doubt there might be under the language as to the place to which to send the report on the boundaries of the "district" is dispelled by the regulation.

CONCLUSION

It is therefore respectfully submitted that the judgments of the district court should be reversed.

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SEPTEMBER, 1953.

APPENDIX A

The Act of January 2, 1951, 64 Stat. 1134 (15 U.S.C. (Supp. V), 1171-1177), provides in pertinent part as follows:

That as used in this Act—

(a) The term "gambling device" means—

(1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device.

* * * * *

Sec. 2. It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia,

or possession; *Provided*, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section.

* * * * *

Sec. 3. Upon first engaging in business, and thereafter on or before the 1st day of July of each year, every manufacturer of and dealer in gambling devices shall register with the Attorney General his name or trade name, the address of his principal place of business, and the addresses of his places of business in such district. On or before the last day of each month every manufacturer of and dealer in gambling devices shall file with the Attorney General an inventory and record of all sales and deliveries of gambling devices as of the close of the preceding calendar month for the place or places of business in the district. The monthly record of sales and deliveries of such gambling devices shall show the mark and number identifying each article together with the name and address of the buyer or consignee thereof and the name and address of the carrier. Duplicate bills or invoices, if complete in the foregoing respects, may be used in filing the record of sales and deliveries. For the purposes of this Act, every manufacturer or dealer shall mark and number

each gambling device so that it is individually identifiable. In cases of sale, delivery, or shipment of gambling devices in unassembled form, the manufacturer or dealer shall separately mark and number the components of each gambling device with a common mark and number as if it were an assembled gambling device. It shall be unlawful for any manufacturer or dealer to sell, deliver, or ship any gambling device which is not marked and numbered for identification as herein provided; and it shall be unlawful for any manufacturer or dealer to manufacture, recondition, repair, sell, deliver, or ship any gambling device without having registered as required by this section, or without filing monthly the required inventories and records of sales and deliveries.

Sec. 4. All gambling devices, and all packages containing any such, when shipped or transported shall be plainly and clearly labeled or marked so that the name and address of the shipper and of the consignee, and the nature of the article or the contents of the package may be readily ascertained on an inspection of the outside of the article or package.

Sec. 5. It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of title 18 of the United States Code or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of title 18 of the United States Code.

Sec. 6. Whoever violates any of the provisions of sections 2, 3, 4, or 5 of this Act shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Sec. 7. Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in violation of the provisions of this Act shall be seized and forfeited to the United States. All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this Act, insofar as applicable and not inconsistent with the provisions hereof: *Provided,* That such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of gambling devices under this Act by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

* * * * *

APPENDIX B

The regulations promulgated pursuant to 5 U.S.C. 22 by the Attorney General of the United States to implement the Act of January 2, 1951 are as follows (16 F.R. 3509, 28 C.F.R. (1952 Supp.) 3):

The following regulations are hereby prescribed for carrying out certain provisions of the act of January 2, 1951, entitled "An Act to prohibit transportation of gambling devices in interstate and foreign commerce" (Public Law 906, 81st Congress)

Sec. 3.1 *Registration and filing of reports by manufacturers of and dealers in gambling devices having places of business in Illinois.* Manufacturers of and dealers in gambling devices having places of business in the State of Illinois shall (a) register as required by section 3 of the act of January 2, 1951, entitled "An Act to prohibit transportation of gambling devices in interstate and foreign commerce" (Public Law 906, 81st Congress) with the Attorney General at the office of the United States Attorney, 219 South Clark Street, Chicago, Illinois, and (b) file the monthly reports required by that section with the Attorney General at the same place.

Sec. 3.2 *Registration and filing of reports by manufacturers of and dealers in gambling devices having places of business in States other than Illinois.* Manufacturers of and dealers in gambling devices having places of business in States other than the State of Illinois shall (a) register as required by section 3 of the said act of January 2, 1951, with the Attorney General

at the Department of Justice Building, Washington, D. C., and (b) file the monthly reports required by that section with the Attorney General at the same place. The term "States" as used in this section includes Alaska, Hawaii, Puerto Rico, the Virgin Islands, and Guam.

Sec. 3.3 *Seizures.* The Director, Associate Director, Assistant to the Director, Assistant Directors inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice are hereby authorized and designated to make seizures of gambling devices under the said act of January 2, 1951.

Sec. 3.4 *Custody and Forfeiture.* (a) All gambling devices seized pursuant to section 3.3 shall be held for, or turned over to, the United States marshal for the district in which the seizure is made. Other than the authority granted in section 3.3, United States marshals are hereby authorized and designated as the officers to perform the various duties with respect to seizures and forfeitures of gambling devices under the said act of January 2, 1951, as are imposed upon collectors of customs or any other persons with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws.

(b) The Attorney General will perform, with respect to the seizure and forfeiture of gambling devices under the said act of January 2, 1951, the functions and duties now performed by the Secretary of the Treasury in regard to the seizure and forfeiture of vessels,

vehicles, merchandise, and baggage under the customs laws.

This order shall become effective on the date of its publication in the Federal Register. The regulations prescribed by the order are necessary for carrying out certain provisions of the act of January 2, 1951, entitled "An Act to prohibit transportation of gambling devices in interstate and foreign commerce" (Public Law 906, 81st Congress), which became effective upon the date of its approval. Compliance with the provisions of section 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1003) with respect to notice of proposed rule making and delayed effective date is impracticable and contrary to the public interest in this instance because such compliance would unduly delay and impede the administration and enforcement of the said act.

(S.) J. HOWARD MCGRATH,
Attorney General.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 40

UNITED STATES OF AMERICA, APPELLANT

v.

ROSCOE DENMARK

No. 41

UNITED STATES OF AMERICA, APPELLANT

v.

MILTON BRAUN

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF FOR APPELLEES

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I. STATEMENT OF FACTS

The facts as stated in the transcript of the records and in the Brief of the United States are correct.

II. ARGUMENT AND AUTHORITIES

1. HISTORY SURROUNDING THE ACT AND ITS APPLICATION TO APPELLEES.

The Act under which these Defendants are prosecuted is known as Public Law 906, 81st Congress (1950) and is codified in United States Code, Title 15, Section 1173. This section requires all dealers and manufacturers in gambling devices as defined in Title 15, USCA, Section 1171, to register with the Attorney General and to file monthly reports of sales and inventories. When this Act was before the Congress there was much discussion as to what was intended by the Act. In the beginning it was known as the Johnson Act and was sponsored by Senator Johnson of Colorado. In the course of the hearing on the Bill we gained some knowledge of what was intended by Congress in passing this law. In Congressional Record No. 19 of September 11 to September 23, page 15360, Senator Johnson made this statement:

"In drafting this bill we leaned far backwards to give the States every opportunity absolutely to run their own affairs. We have had proposed legislation which attempted to invade the State's jurisdiction. This bill very scrupulously avoids doing that. It allows every State to run its own business."

On the same Bill, Senator Malone said: "What is attempted is merely to prohibit gambling devices to enter areas where they are illegal."

Senator Johnson further stated on Page 15363: "Let me say here and now that this is one of the few bills in the last two decades which is scrupulous about State's rights; it keeps the Federal Government out of State and local police powers; no Federal official is going to become an enforcement officer in any State or locality. All it does is exercise the constitutional duty of the Federal Government with respect to interstate commerce by denying the avenues of such commerce to slot machines unless a State has made the operation of slot machines within that State legal."

Again in United States Congressional Code Service, 81st Congress, 2nd Section (1950), beginning on page 4240 we find some history of the Act. It is there stated that: "the primary purpose of this legislation is to support the policy of those States which outlaw slot machines and similar gambling devices, by prohibiting use of the channels of interstate commerce for the shipment of such machines or devices into such States." On page 4243 it is said: "It was contended by the proponents of the bill that the State and local law enforcement officers are unable to cope with these organizations on the State and local levels, and that Federal assistance is required by closing the channels of interstate commerce to the shipment of slot machines and similar devices." On page 4244, it is stated: "On the other hand, the committee desires to emphasize that Federal law enforcement in

the field of gambling cannot and should not be considered a substitute for State and local law enforcement in this field."

Further on page 4244, it is stated: "In this approach your committee is in complete agreement with the views of the Attorney General with respect to the purpose of the recommended legislation, as stated by the representative of the Attorney General in the course of the hearings (page 55):

> "The only thing that the Federal Government is being asked to do under this bill is to stop, in the channels of interstate commerce, the shipment of these machines which the States are powerless to keep out of the channels of interstate commerce. Actually enforcement against those people who gamble or use these machines wrongfully in the States is left with the States and with the local officers, and there is absolutely no intention on the part of the Federal Government, express or otherwise, in this bill or anything that accompanies it, to get us into a prohibition era."

The foregoing indicates the intention of the Congress to eliminate from interstate commerce gambling machines and similar devices. Therefore in the final enactment of the bill and its codification we have Title 15, Section 1172, which prohibits the shipment of such devices in interstate commerce.

In addition to the foregoing with reference to the idea behind this bill, we have Section 1173 of Title 15, USCA, which will be referred to and discussed as the section with which these defendants are

charged with violating, with reference to the history of the Section and the Defendants' contention that the section is too vague and indefinite to be enforced as a criminal statute for the reason that this section requires a dealer to register with the Attorney General his name or trade name, the address of his principal place of business and the addresses of his places of business in said district, and requires a dealer to file with the Attorney General an inventory and record of all sales and deliveries of gambling devices as of the close of the preceeding calendar month for the place and places of business in the district. When this Act was being considered by the committee in its original form, it provided that registration should be made with the Collector of Internal Revenue in the district of the dealer. The Secretary of the Treasury suggested that perhaps the Collectors of Internal Revenue were designated in what is now Section 1173, Title 15, USCA, because of the fact that an annual license is imposed upon persons who maintain for use coin operative gambling devices. The Secretary pointed out, however, that the taxes are imposed upon the person who permits the use of such device on his premises, and not upon the manufacturer or dealer, or operator.

On page 4253 of the United States Code Congressional Service, 81st Congress, 2nd Section, there is quoted a letter from the Acting Secretary of the Treasury which points out that since this Act has no revenue fees and is purely an enforcement statute that the Revenue Department should not be the department with whom the dealers and manufacturers

should register or who should receive the monthly reports.

Apparently, the original draft of the bill has been changed by eliminating the registration with and the reports to the Collectors of Internal Revenue, and there was inserted in lieu thereof the requirement that the registration should be with the Attorney General, and that the reports should be made to the Attorney General. But, by so doing, the lawyers failed to designate the district which must be referred to in the law as "such district" and "the district." We consider a district a definitely defined area and we believe the record of this case will show that the Attorney General of the United States recognizes this deficiency in filing its appeal to this Court where it stated that the Attorney General designated the District Attorney of Illinois as the person with whom dealers should register and file reports as residents of Illinois, and all other dealers of the United States should register with and report to the Attorney General in Washington. It will be argued herein that the Attorney General was given no power by Congress in this law to make any regulations concerning enforcement, and there was no delegation of authority to name any geographic district for any person, and we will respectfully contend that the Act as passed and codified creats an impossibility or is so vague and indefinite that no reasonable person could determine the meaning of the words "such district" and "the district".

Section 1173 of Title 15, USCA is very closely related to the Sections of the Harrison Narcotic Act

which require dealers in opiates, etc., to register and pay license fee before dispensing such narcotics, except that in the Narcotic Act the means of registration and the payment of license is fully set forth.

We would like to point out to this Honorable Court at this point to erase any doubt that may exist, that slot machines are illegal in Georgia under provisions of Code Sec. 26-6502, Code of Ga. 1933, which reads as follows:

"Any person who, by himself or another, shall keep, maintain, employ, or carry on any lottery or **other scheme or device** for the hazarding of any money or valuable thing, shall be guilty of a misdemeanor. (Acts 1877, p. 112.)"

The above quoted Georgia Code Section is construed to include slot machines in the case of ELDER V. CAMP 193 Ga. 320 (see page 321):

"An apparatus known as a slot machine by which a person depositing money therein may, by chance, get directly or indirectly money or articles of value worth more or less than the money deposited, falls within the purview of this section . . ."

"The keeping of a slot machine of the character described being unlawful, ordinarily and prima facie where an owner or operator is found in possession of such a machine, the apparatus is contraband."

The reason that we cite this code section is perhaps the government may contend that interstate commerce of slot machines is not absolutely prohibited

by the Act, due to the provisions of the exception in Sec. 1172 which reads as follows:

"Provided, that this section shall not apply to transportation of any gambling device to a place in any state which has enacted a law providing for the exemption of such State from the provisions of this section, or to any place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section."

Georgia has never passed such an act and there can be no interstate commerce in slot machines, as far as persons in Georgia are concerned.

Bearing in mind the language of the representative of the Attorney General heretofore quoted, the proper construction of this Act, we feel, is this: that all shipments of gambling devices in interstate commerce are prohibited except to those States where the same are legal. Manufacturers or dealers shipping into those States where it is legal should be required to register with the Attorney General and file an inventory. This construction of the Act would allow Sec. 1173 to be held to be constitutional with regard to certain transactions. But we insist that it is unconstitutional with regard to purely intrastate transactions.

In view of the history of the Act, its purpose and intention, we respectfully contend that the Defendants in these cases have not been charged with an

enforceable offense against the United States for two reasons:

(1.) The indictment does not charge either defendant with having made any sale in interstate commerce and shows as a matter of fact that every sale complained of as to each defendant was wholly within the Southern District of Georgia.

(2.) That the Act with reference to the places of registration and reports is incapable of ascertainment as to the district as referred to in the Act.

2. DECISIONS OF LOWER COURTS ON TITLE 15, SECTION 1171-1177 DISCUSSED.

Up to this date we have found the following decisions that have been reported dealing with 15 USCA, Section 1171-1177:

U.S. V. 65 SLOT MACHINES, 102 Fed. Sup. 922. This case does not deal with the questions involved before the Court in the present case. However, on page 925, we do find this:

"This federal statute, however, **has no effect whatever upon any devices or property which was not and continues to remain intrastate; it simply anchors it there,** in so far as interstate transportation is concerned, until the State changes the law." (Emphasis ours).

The case of SMITH ET AL V. McGRAW, ATTORNEY GENERAL 103 Fed. Sup. 286, deals primarily with the meaning of the word "dealer" as used in said

Act. It does not deal with the questions involved in the present case.

In the same volume we find the case of U.S. V. 200 GAMBLING DEVICES, 103 Fed. Sup. 886, which deals likewise with the meaning of the word "dealer" and has an application to the questions involved in the present case, as we will demonstrate later. We quote the Court on page 888 as to the meaning of "dealer": "A dealer in the common acceptance of the word, and therefore, in the legal meaning of the word, is not one who buys to keep or makes to sell, but one who buys to sell again."

In the case of **U. S. V. Prock et al**, 105 Fed. Sup. 263, it was held that: "The statute prohibiting transporting of gambling devices to any place in the states, District of Columbia, or possession of United States from any place outside of such state, District of Columbia, or possession **applies only to shipments in interstate commerce and has no application either to shipments of gambling devices in intrastate or foreign commerce.**" (Emphasis ours.)

The case of U.S. V. 2 EXHIBIT ROTARY COIN OPERATIVE GAMBLING DEVICES, 107 Fed. Sup. 314 deals with what sort of gambling devices are prohibited by the statute and has no bearing on the present case.

The case of U. S. V. 178 and 48 gambling devices, 107 Fed. Sup. 394 does not touch on the points involved in the case. The Court held that "careful study of the Act together with previous decisions of the Su-

preme Court of the United States thought to be somewhat similar, has convinced me that the act can only be applicable in interstate transactions." (Emphasis ours.)

Further said on page 396: "But to penalize the possessor or user of such devices or 'destroy the use of the device itself' where it has not offended interstate commerce provisions would in effect require a holding that the act created a substantive offense aimed primarily at intrastate commerce over which Congress has not power. This could not be said to be for the legitimate purpose of implementing interstate commerce provisions. The construction for which the government contends would, in my judgment, place such provisions beyond the reach of Congress." (Emphasis ours.)

In U. S. V. SCHMIDT 107 Fed. Sup. 501, a three judge court held that the parties had an administrative remedy and therefore were not entitled to an injunctive relief.

In the case of U.S. V. 139 SLOT MACHINES, 109 Fed. Sup. 23, the Court held that "persons purchasing slot machines as investments and operating them intrastate in others' places of business at profit, instead of selling them, were not "dealers" in gambling devices, required by the act prohibiting transportation of such devices in interstate commerce to register with the Attorney General, so that machines, in being possessed or used in violation of the Act, were not subject to forfeiture or confiscation."

In the case of McDONOUGH ET AL V. U.S., 202 F. 2nd 424, it merely held that slot machines were not contraband and should be returned to the place where they were seized.

While none of these cases are completely in every respect pertinent to questions raised in the present case, yet it can be seen by reading these cases that the District Courts all felt that the Act should be limited in its application to interstate commerce, which is in accord with the intention of Congress as we have set out briefly in this brief.

We invite this Honorable Courts' attention to the decision rendered by Judge Scarlett, the Judge of the District Court, which is contained in pages 4 and 5 of the transcript of the records, in which he quotes Judge Sloan and Judge Cooper in two other cases.

3. DISCUSSION OF AUTHORITIES CITED BY THE GOVERNMENT.

The government, to sustain its position that Congress may require, as a means of enforcing a valid law, the keeping of records showing whether or not the law has, in fact, been complied with, and that the government may require records, even of intrastate transactions, since it is an appropriate means to a legitimate end, relies principally upon the following cases:

U.S. V. DARBY, 312 U.S. 100; 61 S. Ct. 451.

BALTIMORE & OHIO RAILROAD COMPANY V. INTERSTATE COMMERCE COMMISSION, 221 U.S. 612; 31 S. Ct. 621.

BOARD OF TRADE OF CHICAGO ET AL. V. OLSEN ET AL. 262 U.S. 1; 43 S. Ct. 470.

UNITED STATES V. WRIGHTWOOD DAIRY COMPANY, 315 U.S. 110.

UNITED STATES V. SULLIVAN, 332 U.S. 689.

WICKARD V. FILBURN, 317 U.S. 111.

We do not feel that any of these cases are controlling in the present case and we will discuss them in the order that we have them above.

U.S. V. DARBY, above cited, can be distinquished from the present case for the following reasons:

(1.) See page 111: "The indictment charges that appellee is engaged, in the state of Georgia, in the business of acquiring raw materials, which he manufactures into finished lumber with the intent, when manufactured, to ship it in interstate commerce to customers outside the state, and that he does in fact so ship a large part of the lumber so produced."

The indictment further alleges: (See the same page) "that appellee unlawfully failed to keep such records of employees engaged in the production and manufacture of goods, to-wit, lumber, for interstate commerce."

In the present case there is no such allegation that the defendants were involved in the shipment of slot machines in interstate commerce. On the contrary, it was conceded that there were no interstate sales.

(2.) In the Darby case it is plain to see that production of lumber within a state would affect interstate commerce, since even if Darby had not shipped in interstate commerce, lumber produced by employing substandard labor could have been sold intrastate much cheaper than lumber could have been sold by persons producing it in other states, desiring to sell it in Georgia, which would have had the effect of cutting off producers outside of the state from competing in the State. But, in the present case interstate shipment of slot machines is prohibited and there can be no interstate commerce, as far as the state of Georgia is concerned. Therefore the market value of machines in other states could not affect in anywise the market value of machines in Georgia, nor could the market value in Georgia affect the market value of machines in other states.

(3.) In the Darby case under the terms of the wage and hour law, interstate commerce was not prohibited absolutely, but it was only prohibited as to those who did not comply with the provisions of the wage and hour law. In other words, the producers themselves could, by complying with the wage and hour law, ship in interstate commerce.

In the present case there is nothing that appellees could do whereby they could in anywise engage in interstate commerce, since it is prohibited by Section 1172 of the Act.

(4.) In the Darby case there was an intermingling of interstate and intrastate transactions, which were

not readily capable of being separated. Whereas, in the present case there are no interstate transactions.

THE BALTIMORE AND OHIO RAILROAD COMPANY V. INTERSTATE COMMERCE COMMISSION, above cited, differs from the present case because:

(1.) Baltimore and Ohio Railroad Company was engaged in interstate commerce, and the Court reached its conclusions that the act was constitutional because the intrastate operations and interstate operations were so interwoven that it was utterly impractical to separate them, and that Congress clearly had the authority to regulate interstate commerce, thus in the third division of opinion, it was held that the Commerce Commission, under the terms of the act, had the right to require the filing of monthly reports. There is no express holding in this case that the commission had the right to require the reports on purely intrastate transactions.

(2.) Interstate commerce was not prohibited by the Act there under consideration, as is the case under Title 15, Section 1172, involved in the present case.

The case of INTERSTATE COMMERCE COMMISSION ET AL V. GOODRICH TRANSIT COMPANY, above cited, differs from the present case in that the Goodrich Transit Company was engaging in interstate commerce, which was not prohibited. The interstate commerce act in question in this case expressly stated that the act did not apply to transportation of persons or property wholely within one state.

On the last page of this opinion the distinction between this case and the present case is clearly set out by the following language:

"But bookkeeping may and ought to show how a business which, in part at least, is interstate commerce, is carried on, in order that the commission, charged with the duty of making reasonable rates and prohibiting unfair and unreasonable ones, may know the nature and extent of the business of the corporation, the cost of its interstate transactions . . ."

The other case dealing expressly with the requirement of reports is that of BOARD OF TRADE OF CHICAGO V. OLSEN, above cited. In this case it was held that in division nine of the opinion: "Grain Futures Act, September 21, 1922, Sec. 9 making it a misdemeanor for a member of Board of Trade designated thereunder to fail to evidence any contract for future delivery by a record in writing, is a legitimate means of enforcing the statutory regulation of Boards of Trade, which is within the power of Congress."

This case has no application to the present case because under the terms of the Grain Futures Act, the Act regulated interstate commerce and sales of grain in interstate commerce ONLY.

The case of KENTUCKY WHIP AND COLLAR COMPANY V. ILLINOIS RAILROAD COMPANY, 299 U.S. 334, is distinguishable from the present case because the prison made labor goods were actually tendered for shipment in interstate commerce.

The case of U.S. V. SULLIVAN 332 U.S. 689 is distinguishable from the present case because the act there under discussion requires the labeling or relabeling of the drugs, which had been received in interstate commerce, and therefore the burden would have been upon the government to prove that the goods at one time or another had moved in interstate commerce.

The case of WICKARD V. FILBURN, 317 U.S. 111 merely holds that Congress may regulate those activities intrastate which so affect interstate commerce, as to make regulation of them appropriate means to the exercise of the granted power to regulate interstate commerce. Certain it is that the grain here discussed would affect the total supply of grain in the country, and thus affect prices of grain shipped interstate.

The sum and substance of these cases which are relied upon by the Government is that in each and every one of them there was an element of interstate commerce, which Congress clearly has the power to regulate.

There was further intermingling of interstate and intrastate transactions, which were incapable of being separated and, at least in the Darby case, the intrastate transactions would affect interstate commerce, and thus would come under the power of Congress to regulate, as has been held in previous decisions of this Honorable Court.

However, in the case before this Court for decision Congress having prohibited interstate commerce,

there being no allegation in the indictment that appellees were engaged in any interstate transactions, it is manifest that Congress could not require the filing of these reports, since the transactions were neither interstate transactions, which would come under the power of Congress, nor were they intrastate transactions, which would in any wise affect interstate commerce.

Another line of cases the government relies upon is that of NIGRO V. U.S., 276 U.S. 352. This case and the case of U.S. V. DOREMUS, 249 U.S. 86 and that of LINDER V. U.S., 268 U.S. 5 deal with the Narcotic Act. As we have stated herein before the Harrison Narcotic Act in terms of its language, (see Title 26, Sec. 3221 A) is very similar to the language employed in the Johnson Act.

We can see that the Government could, in aid of a REVENUE MEASURE, require records and reports of purely intrastate transactions, but the Johnson Act is not a revenue measure. A glance at these cases will show clearly the distinction that we have pointed out.

The Court in NIGRO V. UNITED STATES, 276 U. S. 332 (see 48 S. Ct. 388) says:

"In interpreting Anti-Narcotic Act (26 USCA, 211, 691-711; Comp. St. 6287g-6287q) court must in view of amendment of sec. 1 by Revenue Act 1918, 1006 (26 USCA, 211, 691-695; Comp. St. 6287g), assume that it is taxing measure, since, if it were merely to regulate and restrain purchase of opiate and other drugs, it would be beyond the power of Congress, and invalid." (Emphasis ours).

In the case of U. S. V. DOREMUS, 249 U. S. 86 the Court said:

"If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it."

The act "has such relation to facilitating the collection of the revenue as to be within the power of Congress under the authority given by Const. Art. 1, Sec. 8, to impose excise taxes, and is not a mere attempt to exercise a power not delegated, the reserved police power of the states."

It was held in LINDER V. U.S. 268 U.S. 5 (see page 17 of the opinion):

"The declared object of the Narcotic Law is to provide revenue, and this Court has held that whatever additional moral end it may have in view must 'be reached only through a revenue measure and with the limits of a revenue measure.' UNITED STATES V. JIN FUEY MOY, 241 U.S. 394, 402, 36 S. Ct. 658, 60 L. Ed. Ann. Cas. 1917D, 854. Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the federal government. **And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid and cannot be en-**

forced. (Emphasis ours) 45 S. Ct. R 446-448; McCulloch v. Maryland, 4 Wheat, 316, 423, 4 L. Ed. 497; U.S. v. DeWitt, 9 Wall. 41, 19 L. Ed. 593; Keller v. U.S. 213 U.S. 138, 29 S. Ct. 470, 53 L. Ed. 737, 16 Ann. Cas 1066; Hammer v. Dagenhart 247 U.S. 251, 38 S. Ct. 529, 62 L. Ed. 1101, 3 A.L.R. 649 Ann. Cas. 1918E. 724; Child Labor Tax Case 259 U.S. 20, 42 S. Ct. 449, 66 L. Ed. 817."

Following the reasoning in the Linder Case we can not see how Title 15, USCA, Sec. 1173 can have any application to intrastate dealers in slot machines. The power to prohibit shipment of slot machines in interstate commerce is delegated to Congress by the Commerce Clause, and under it, Congress may prohibit interstate shipments of slot machines. How can it, in turn, regulate that which it prohibits? Or how can these intrastate sales affect interstate commerce, so as to allow Congress to require these reports when there can be no interstate commerce?

Thus, we concede the following to be the law and about which we have no difference of opinion with the government.

(1.) Congress has the power to ban from interstate commerce articles injurious to public health, morals or welfare and may aid state law enforcement by prohibiting the use of channels of interstate commerce to contravene state policy as is provided in Sec. 1172 of the Act.

(2.) In exercising its delegated power under the commerce clause, Congress can regulate those intrastate activities which so affect interstate commerce, or the

exertion of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end.

(3.) Congress can require records and reports of purely intrastate transactions in aid of a Revenue Measure.

4. THE INFORMATIONAL REQUIREMENTS, AS FAR AS PURELY INTRASTATE TRANSACTIONS ARE CONCERNED, ARE NOT REASONABLE MEANS OF ENFORCING THE PROVISION AGAINST INTERSTATE TRANSPORTATION OF SLOT MACHINES, AND THEREFORE ARE BEYOND THE POWER OF CONGRESS.

As a representative of the Attorney General said, whom we have quoted hereinbefore:

"This act did not intend to get us into a prohibition era."

We feel that the construction contended for by the Government might have this effect, for what dealer in a state in which slot machines are illegal, would report, under the terms of Section 1173 of the Act, that he had shipped machines to another state, where slot machines are illegal? To expect him to do so would seem to be the height of absurdity. For, what criminal who had just violated Section 1172 of the Act by so shipping slot machines would hesitate to violate Section 1173, by failing to make a report.

The analogy given by the Government on page sixteen of their brief overlooks the fact that the Act re-

quires only "dealers" and "manufacturers" to file reports.

The word "dealer" as it was used in the case of UNITED STATES V. 200 GAMBLING DEVICES, 103 Fed. Sup. 888: "implies a habitual course of dealing and considered from this viewpoint has been defined as meaning one who habitually and constantly, as a business, deals in and sells any given commodity." And also, "one who buys the product in quantities and parcels it out by sale in lesser amounts."

The act does not require purchasers, who do not buy with the intention of selling or casual sellers to report transactions. In the normal course of all business in this country, dealers do not sell to dealers, but dealers sell to a consumer or ultimate users. The act does not require that the ultimate user register. The reason that the analogy given on page 16 by the government is fallacious is this: If C referred to on page 16 of the brief purchased the machines from B, which had been shipped interstate and which sale had not been reported by B, and C was an operator who intended to put the machines on location, he would not be required under the terms of the Act to report the purchase. C also would know that the machine or machines were subject to seizure under Section 7 of the Act and even if he were a dealer, he would hardly report the purchase, so that it could be seized and he would lose the money he had paid.

The government is careful to label M as manufacturer and A as dealer, but it does not put the definition of dealer on C presumably, because the Govern-

ment recognizes that C would not be required to register under the terms of the Act.

We do not mean to imply that Sec. 1173 has no reasonable application to the enforcement of Sec. 1172, because of the possibilities of evasion, but we do here state that the construction contended for by the Government i.e. Sec. 1173 requires reports of purely intrastate transactions is an unreasonable construction to place upon the act because as we have shown heretofore in the brief, it was not the intention of Congress to regulate purely intrastate transactions or local matters, which would be in the hands of local authorities. Also this construction by the Government is not reasonable because the act requires only dealers and manufacturers to register and file reports, which in itself would reenforce our construction that the act intends only to require reports of interstate transactions. Since purchasers or casual seller would not be required to register their purchases and sales, Section 1173 would not enable the Government, even under its construction, to trace and identify every slot machine in the country.

Therefore, under the language used in U. S. v. LINDER, 268 U. S. (see page 17) which reads as follows:

". . . any provision of the Act of Congress ostensibly enacted under power granted by the Constitution, NOT NATURALLY AND REASONABLY ADAPTED TO THE EFFECTIVE EXERCISE OF SUCH POWER, but solely to the achievement of something plainly within power reserved to the states,

is invalid and cannot be enforced." The requirement is beyond the power of Congress.

5. SECTION THREE OF THE ACT IS VOID AND UNENFORCEABLE FOR VAGUENESS.

As we have outlined hereinbefore in this brief, Section 3 does not clearly designate where the reports are to be made, but uses the phrase "in such district." A district is, or should be, a definitely defined area. The Attorney General, on April 24, 1951, when he promulgated the regulation shown in Appendix B of the brief of the government, recognized this defect.

Congress has given the Attorney General no power to set up such a district. The Government itself on page 25 makes this statement:

"... and whatever doubt there might be under the language as to the place to which to send the report on the boundaries of the 'district' is dispelled by the regulation."

It can be seen from reading Counts 2, 3 and 4 of the indictment against Braun contained on pages 1 and 2 of the transcript of the records that Braun was in these counts charged with failure to report in February and March of 1951, which was before the regulation was adopted on April 24, 1951.

Even under the government's contention, there was some doubt prior to the adoption of the regulation. Therefore, the doctrine "where patently ambiguous language is so unclear and equivocal as to render its enforcement a denial of due process of law. Cf.

UNITED STATES V. CARDIFF, 344 U. S. 174; UNITED STATES V. SPECTOR, 343 U. S. 169, 171-172; UNITED STATES V. PETRILLO, 332 U. S. 1, 5-7," should be applied.

It was stated in the case of LANZETTA ET AL V. THE STATE OF NEW JERSEY, 306 U. S. 451-453: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in CONNALLY V. GENERAL CONST. CO. 269 U. S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law'."

Therefore we feel fully justified that the terms of the Section 1173 are insufficient to inform those who are subject to it as to what their conduct should be.

III. CONCLUSION

1. The various charges in the indictment against the appellees being purely intrastate transactions and reports and registrations called for in Title 15, USCA, Sec. 1173 having no reasonable application to the prohibition of interstate commerce, it is beyond the power of Congress to require registration and reports of purely intrastate transactions.

2. Section 1173 of the Act is so vague and indefinite as to the place where the reports should be filed as to render the Section void for vagueness.

It is therefore respectfully submitted that the judgments of the District Court should be sustained.

MYRICK & MYRICK
Attorneys for Appellees

September 1953

BRANNEN, CLARK & HESTER
By Perry Brannen
Attorneys for Denmark

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

Indictment No. 13392

UNITED STATES OF AMERICA, APPELLANT

v.

MILTON M. BRAUN

STATEMENT AS TO JURISDICTION

In compliance with Rule 37(a)(1) of the Federal rules of Criminal Procedure and Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court dismissing the indictment.

OPINION BELOW

The opinion of the District Court has not yet been reported. A copy thereof is annexed hereto as an Appendix.

JURISDICTION

The order of the District Court dismissing the indictment was entered on February 26, 1953. The jurisdiction of the Supreme Court to review on

direct appeal the decision of the District Court dismissing the indictment based on a construction and the unconstitutionality of the statute upon which the indictment is founded is conferred by 18 U.S.C. 3731. See also Rules 37(a)(2) and 45(e) F.R. Crim. P.

QUESTION PRESENTED

Whether, in aid of its power to prohibit the shipping of gambling machines in interstate commerce, Congress may require dealers in such machines to register with the Attorney General, and to report all sales, including intrastate deliveries.

STATUTE INVOLVED

The Act of January 2, 1951, 64 Stat. 1134, upon which the instant indictment is founded is set forth in pertinent part as Appendix B to the Statement as to Jurisdiction in *United States* v. *Roscoe Denmark*, filed contemporaneously with the instant statement.

STATEMENT

On May 13, 1952, in the District Court for the Southern District of Georgia a five-count indictment was returned against the defendant, the first count of which charged him with engaging in the business of a dealer in gambling devices without having registered with the Attorney General of the United States his name, trade name, and address of his place of business, and in the remaining four counts with having failed to file with the Attorney General an inventory and record of various sales and deliveries of gambling devices, all as required

by Section 3 of the Act of January 2, 1951, 64 Stat. 1134 (15 U.S.C. 1173). Defendant filed a motion to dismiss the indictment which was granted on February 26, 1953.

In its opinion dismissing the indictment, the District Court noted that "No allegation is made in the Indictment as to any of the sales being interstate commerce, and the Assistant District Attorney conceded that there were no interstate sales." The Court held, as it had previously held in the companion case of *United States* v. *Denmark* that "Section 1173 has no application to the defendant in this case, since the statute under consideration does not apply to intra-state transactions which do not directly affect interstate commerce," and further that "the Statute involved, in so far as it undertakes to regulate purely intra-state transactions which do not directly affect interstate commerce, goes beyond the power of Congress under the Commerce Clause of the Constitution."

THE QUESTION IS SUBSTANTIAL

The instant case is a companion case to *United States* v. *Roscoe Denmark* from which decision of the United States District Court for the Southern District of Georgia the Government is appealing directly to the Supreme Court of the United States. As the District Court grounded its opinion both in this case and in the Denmark case on an identical interpretation of the applicability of Section 3 of the Act of January 2, 1951, the Government respectfully refers the court to the Statement

as to Jurisdiction filed contemporaneously with the instant Statement, which more particularly sets out the substantiality of the common question involved, and the error of the District Court in its opinion and order dismissing a similar indictment.

(Signed) ROBERT L. STERN,
Acting Solicitor General.

Dated: March 19, 1953.

Endorsement: Criminal Indictment No. 13392. Statement as to Jurisdiction of Supreme Court of United States on Appeal. Filed in Clerk's Office: March 26th, 1953. Eugene F. Edwards, Deputy Clerk.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION

Indictment No. 13392

Violation: Title 15, U.S.C., Section 1173

UNITED STATES OF AMERICA

v.

MILTON M. BRAUN

STATEMENT OF THE CASE

An indictment in five counts was returned against MILTON M. BRAUN in the District Court of the United States for the Southern District of Georgia, Savannah Division, charging a violation of Title 15, U.S.C. Section 1173.

The first count charges that the defendant was a dealer in gambling devices and failed to register with the Attorney-General of the United States.

The other four counts of the Indictment charged that the defendant on various dates sold amounts of gambling devices to named persons, and failed to file an inventory and record of sales and deliveries with the Attorney-General.

The defendant filed a motion to dismiss the indictment, on three grounds,—one of the grounds being that the Act, Section 1173, did not extend to purely intra-state transactions which do not directly affect interstate commerce, but if the Act was intended to apply to purely intra-state transactions, then the same was unconstitutional because

of the tenth amendment to the Constitution. As this opinion deals with the application of the said Act to purely intrastate transactions and the constitutionality thereof under the state of facts as alleged in the indictment, no discussion is had on the other grounds of the motion to dismiss.

The indictment and all counts thereof are based on Title 15, U.S.C., Section 1173. No allegation is made in the indictment as to any of the sales being interstate commerce, and the Assistant District Attorney conceded that there were no interstate sales.

OPINION AND JUDGMENT OF THE COURT

The Act in question, to-wit, Title 15, 1171-1175, was passed pursuant to the power of Congress to regulate interstate commerce. There is no question but that Congress has power to prohibit the transportation of gambling devices in interstate commerce. It is equally true that Congress has the power to regulate intra-state transactions which directly affect interstate commerce. But the power of Congress to regulate these matters cannot extend to matters the effect of which, whatever its extent, is indirect. (see *James Walter Carter* v. *Carter Coal Co., et al.*, 298 U.S. Page 238 (21), also see page 297.)

In the case of *United States* v. *Five Gambling Devices*, Libel for Forfeiture, in the Northern District of Georgia, Judge Sloan, in considering the Statute here involved, ruled: "It is neither shown nor contended that purely intra-state transactions in gambling devices in any way interfere with or

obstruct the regulation of such devices in interstate commerce, and to extend the Act to purely intra-state transactions gives to the Act an effect beyond the constitutional power of Congress. The Act does not apply to intra-state transactions."

In the case of *United States of America* v. *15 Mills Blue Bell Gambling Machines, et al.*, Libel in Rem, in the Middle District of Georgia, Judge Cooper, in considering the Statute here under consideration, ruled: "The fifth defense is predicated on the theory that the Act under which these proceedings are brought seeks to regulate intra-state commerce, which is beyond the power of Congress to do. This defense is sustained."

In view of the above decisions, and in view of the fact that there are no interstate transactions involved in this case, and the transactions involved in this case were purely intra-state transactions, the Court therefore is of the opinion that Section 1173 has no application to the defendant in this case, since the Statute under consideration does not apply to intra-state transactions which do not directly affect interstate commerce.

It seems clear to the Court that the Statute involved, in so far as it undertakes to regulate purely intra-state transactions which do not directly affect interstate commerce, goes beyond the power of Congress under the Commerce Clause of the Constitution.

In accordance with the foregoing opinion,

IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court, That the motion of the defendant to dismiss the indictment and all the counts thereof, be, and

the same is hereby sustained, and said indictment and all counts thereof is hereby dismissed.

This 25th day of February, 1953.

(Signed) F. M. SCARLETT,
United States Judge.

Endorsement: Criminal Indictment No. 13392, Opinion and Judgment of Court on Defendant's Motion to Dismiss Indictment. Filed in Clerk's Office: February 26, 1953. Eugene F. Edwards, Deputy Clerk.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 201504 1010